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The Much Maligned 527 and Institutional Choice

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THE MUCH MALIGNED 527 AND INSTITUTIONAL CHOICE

LLOYD H. MAYER*

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INTRODUCTION

Swift Vets and POWs for Truth.¹ Americans Coming Together.² Republicans for Clean Air.³ These groups are only the most prominent of the much maligned “527s” – political organizations “named for a tax-code provision” that provides them with their tax-exempt status.⁴ It would be easy to leave the explanation of the term 527s at that and move on to discuss whether they are truly the blight on democracy as asserted by some,⁵ or the bastions of free speech and free association as argued by others.⁶ But doing so skips over a series of intriguing and important questions. What does tax law have to do with political activity – isn’t that what election law is for? And given the existence of election law and the Federal Election Commission (FEC), how should Congress determine what role, if any, the tax law and the Internal Revenue Service (IRS) should play with respect to political activity? Can these two bodies of law and their administering agencies both effectively regulate political activity?

These questions are far from theoretical. After almost a century of election law and tax law operating separately in the political sphere, Congress breached

¹ See Glen Justice & Kate Zernike, ‘527’ Groups Still at Work Raising Millions for Ads, N.Y. TIMES, Oct. 16, 2004, at A10 (describing the role of the Swift Vets group – formerly known as Swift Boat Veterans for Truth – in funding television commercials attacking Senator and presidential candidate John Kerry).

² See Leslie Wayne, *And for His Next Feat, a Billionaire Sets Sights on Bush*, N.Y. TIMES, May 31, 2004, at A13 (describing the funding and expected role of Americans Coming Together in the 2004 elections).

³ See David Folkenflik, *Political Donors Find New Loophole: Tax-Exempt Groups Can Spend Unlimited Sums, Hide the Givers*, BALT. SUN, Apr. 24, 2000, at 1A (describing activities of various 527s in the 2000 elections, including Republicans for Clean Air).

⁴ Stuart Taylor Jr., *Political Litter: With Many Words but Little Clarity, the Supreme Court Thrashes Around over Electoral Fundraising and Redistricting*, LEGAL TIMES, July 3, 2006, at 44; see also 26 U.S.C. § 527 (2000 & Supp. IV 2004).

⁵ See, e.g., Editorial, *And This Just in on Elections*, N.Y. TIMES, Dec. 16, 2006, at A16 (labeling 527s “[s]hadowy party operatives”); Glen Justice, *G.O.P. Group Says It’s Ready To Wage Ad War*, N.Y. TIMES, Aug. 25, 2004, at A20 (quoting President Bush as saying, “I don’t think we ought to have 527’s I think they’re bad for the system”).

⁶ See, e.g., Stephen Moore, *Issue Ads: Let ‘Em Rip*, WASH. POST, Sept. 18, 2004, at A25 (defending political ads by outside groups, including 527s, as “fulfill[ing] an important role in our democratic system” by preventing candidates and political parties from monopolizing communications “during the campaign season”).

that separation in 2000 by imposing an extensive disclosure regime on 527s that mimics the disclosure regime for election-law regulated political committees. This new disclosure, however, is administered by the IRS rather than the FEC.⁷ When this disclosure regime revealed that in 2004 almost half-a-billion dollars flowed through 527s,⁸ Congress began considering legislative proposals that would further mix election law and tax law by extending to most 527s the election law limits on the sources and amounts of contributions that apply to political committees.⁹ Yet during both the passage of the 527 disclosure rules and the current consideration of 527 contribution limits, there has been essentially no discussion regarding the fundamental differences between election law and tax law and how those differences should inform the debate over regulating the much maligned 527s.

A careful evaluation of the relative strengths and weaknesses of these two bodies of law and the agencies that administer them reveals that Congress' current approach to regulating 527s will almost certainly result in a confusing and ineffective legal regime. Part I of this Article provides the context for this evaluation by describing the current election law and tax law rules governing political activity. As detailed in that part, until Congress' recent actions, election law was the sole body of law that limited contributions for political activities (with what qualified as such activities defined narrowly) and required detailed disclosures of donors and expenditures associated with such activities. Tax law only ensured that taxpayers could not deduct expenditures for political activities (with what qualified as such activities defined broadly) or otherwise use dollars exempt from the federal income tax for such activities.

Part II creates a new theoretical framework for evaluating which of two bodies of law is best suited to regulate a particular set of activities by detailing the relevant characteristics of the legislative processes, administering agencies, and effectiveness of administration for each body of law. Part III applies this framework to the current and proposed intersection of election and tax laws, which targets 527s. This application reveals that existing election law is a more visible vehicle and better fit for new rules regulating political activity processes. Additionally, the FEC is more accountable and more effective in implementing such regulation. The FEC has one major flaw, however. In its current form, the FEC is unduly subject to influence by a large portion of its regulated community – incumbent politicians.

Based on this analysis, Part IV proposes several specific changes to how Congress has and continues to approach the regulation of political activity and 527s. First, Congress should shift jurisdiction over the disclosure of political activity by 527s from the IRS to the FEC. Congress should also place responsibility for any further disclosure requirements with the FEC, because

⁷ See *infra* Part I.C. For the definition of a “political committee,” see *infra* notes 29-30 and accompanying text.

⁸ See *infra* note 105 and accompanying text.

⁹ See *infra* notes 106-07 and accompanying text.

the FEC has greater expertise in ensuring the completeness and accuracy of the “just-in-time” disclosure Congress requires for political activity and is more clearly accountable for the success of such a disclosure regime. Second, Congress should resist the temptation to impose FEC-administered contribution limits on 527s as a group or on any other group defined by a tax classification. The IRS’s history of effectively enforcing tax classifications is suspect, and organizations can easily and legitimately shift political activity into other types of tax-exempt and taxable entities. Additionally, attempts to coordinate enforcement between the FEC and the IRS are unlikely to succeed. Third and finally, Congress should restructure the FEC to reduce the influence of incumbent politicians, particularly during individual enforcement actions. The IRS provides one possible model for such restructuring; it has a single Commissioner who is accountable for how the IRS functions, yet at the same time has limited authority over specific enforcement cases.

The framework developed to address this particular issue also has broader application beyond the scope of this Article. For example, this framework may have immediate application to evaluate proposals using tax law to create national standards for nonprofit organizations and charities.¹⁰ Another possible application is the proposed use of tax law to increase the financial transparency of public corporations by requiring them to disclose their federal tax returns.¹¹ Other applications may also exist, including making choices that do not involve tax law.

A brief word on what this Article is not about. This Article does not attempt to explore the significant constitutional issues raised by regulating 527s, a topic that has been addressed at length by others;¹² rather, this Article assumes

¹⁰ See, e.g., PANEL ON THE NONPROFIT SECTOR, INDEP. SECTOR, STRENGTHENING TRANSPARENCY GOVERNANCE ACCOUNTABILITY OF CHARITABLE ORGANIZATIONS 23-82 (2005). See generally STAFF OF S. COMM. ON FIN., 108TH CONG., STAFF DISCUSSION DRAFT (2004), available at <http://finance.senate.gov/hearings/testimony/2004test/062204stfdis.pdf> (recommending numerous uses of tax law to regulate nonprofit organizations).

¹¹ See, e.g., *A Tune-Up on Corporate Tax Issues: What’s Going on Under the Hood?*: Hearing Before the S. Comm. on Fin., 109th Cong. (2006) (statement of Sen. Charles Grassley, Chairman, S. Comm. on Fin.) (stating that one witness would propose requiring public disclosure of Schedule M-3, detailing differences between figures recorded for accounting purposes and those reported for tax purposes, for at least some corporations).

¹² See generally Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949 (2005); Roger Colinvaux, *Regulation of Political Organizations and the Red Herring of Tax Exempt Status*, 59 NAT’L TAX J. 531 (2006); Miriam Galston, *Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups*, 95 GEO. L.J. 1181 (2007); Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55 (2004); Gregg D. Polsky & Guy-Uriel E. Charles, *Regulating Section 527 Organizations*, 73 GEO. WASH. L. REV. 1000 (2005); Adriana Riviere, Comment, *527s: The New Frontier for Election Law and Associational Rights*, 60 U. MIAMI L. REV. 261 (2006); William Ty

some level of regulation is constitutionally permitted. This Article does not attempt to explore the wisdom of the general tax rule that expenditures for political activities are not deductible. That issue has not been raised in the current debates and, despite some recent scholarship suggesting that Congress should revisit the tax treatment of such expenditures,¹³ it is unlikely to become an issue in the foreseeable future. Finally, this Article focuses solely on federal laws, although it is important to note that federal laws can have a significant effect on entities and individuals seeking to influence and participate in state and local elections and also may lead to the enactment of similar state laws.¹⁴

I. CURRENT & PROPOSED LAW

The current attempts to control 527s occur within a larger framework of rules governing political activity, embodied in both election law and tax law provisions. To evaluate the strengths and weaknesses of these attempts, therefore, requires understanding the historical roles of both election law and tax law as they pertain to political activity. This Part details how election law has generally been used to control the disclosure of funding for a narrow range of election-related activities to prevent corruption and the appearance of corruption. Tax law, in contrast, has sought to determine the proper tax treatment of funds used for a broad range of election-related activities without imposing any absolute prohibitions or significant disclosure requirements. These different roles have led these two bodies of law to operate almost completely independently of each other. This Part thus describes each body of

Mayton, *The Myth of 527 Organizations* (Emory Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Research Paper No. 05-15, 2005), available at <http://papers.ssrn.com/abstract=746604>.

¹³ For example, several commentators have proposed reintroducing a federal tax credit for political contributions as one mechanism to increase citizen involvement in political campaigns and/or reduce the influence of special interests. See generally DAVID ROSENBERG, *BROADENING THE BASE: THE CASE FOR A NEW FEDERAL TAX CREDIT FOR POLITICAL CONTRIBUTIONS* (2002); Debra Burke, *Twenty Years After the Federal Election Campaign Act Amendments of 1974: Look Who's Running Now*, 99 DICK. L. REV. 357 (1995); Thomas Cmar, *Toward a Small Donor Democracy: The Past and Future of Incentive Programs for Small Political Contributions*, 32 FORDHAM URB. L.J. 443 (2005); John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591 (2005); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 107-18 (2004). The previous credit existed from 1971 to 1986. See *infra* note 57. Another commentator has proposed using the tax laws to limit political contributions by replacing campaign contribution ceilings with graduated campaign contribution taxes. See generally David S. Gamage, Note, *Taxing Political Donations: The Case for Corrective Taxes in Campaign Finance*, 113 YALE L.J. 1283 (2004).

¹⁴ Further, legislative proposals may successfully become law at the state level while Congress is still considering them at the federal level. See *infra* note 106 (citing a West Virginia law imposing contribution limits on 527s).

law separately before exploring how they now overlap and how pending proposals would increase that overlap.

A. *Election Law*

For the purposes of this Article, election law means non-tax laws relating to the disclosure of, and limits on, contributions and expenditures for political activity.¹⁵ These laws are found in the Federal Election Campaign Act of 1971, as amended (FECA).¹⁶ Both the limits and disclosure provisions arose because of Congress' concern with corruption and the appearance of corruption in elections.¹⁷ Advocates of such rules also sought to reduce the influence of the wealthy over the electoral process,¹⁸ although the Supreme Court has found this reason insufficient to justify the impact of these rules on freedom of speech and freedom of association.¹⁹ In addition, the disclosure provisions provide the electorate with information about candidates and the ability to gather information to detect violations of the various limits.²⁰

The constitutional protections for freedom of speech and freedom of association, and the related issue of encouraging participation by permitting

¹⁵ Other areas of election law include rules relating to eligibility to vote, eligibility to run for office, redistricting, ballot initiatives, and administration of elections. *See generally* SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS* (rev. 2d ed. 2002); DANIEL HAYS LOWENSTEIN, *ELECTION LAW: CASES AND MATERIALS* (1995). At least one commentator has questioned whether "election law" can be so easily defined, however. *See* John Copeland Nagle, *The Appearance of Election Law*, 31 J. LEGIS. 37, 43 (2004). This point is supported by the fact that tax law also regulates election-related activities, as detailed in this Article.

¹⁶ FECA is codified primarily at 2 U.S.C. §§ 431-455 (2000 & Supp. IV 2004).

¹⁷ *See* *McConnell v. FEC*, 540 U.S. 93, 115-17 (2003) (detailing the corruption concerns that underlay Congress' enactment of federal election laws); *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam) (discussing Congress' concern with "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions"). *But see* Adam Winkler, "Other People's Money": *Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 873-74 (2004) (arguing that Congress enacted the ban on corporate political contributions primarily because of a different type of corruption concern – that such contributions represented the improper use of the corporate owners' money).

¹⁸ *See* ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW* 54-66 (1988) (detailing the development of arguments in support of and in opposition to contribution limits, including ones based on the allegedly improper influence of the wealthy).

¹⁹ *E.g.*, *Buckley*, 424 U.S. at 48-49. Recently, however, several Supreme Court Justices have indicated a willingness to reconsider that conclusion. *See* Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 31-32 (2004); *see also* Briffault, *supra* note 12, at 995-99 (arguing that political equality may provide a sufficient governmental interest to support additional restrictions on 527s).

²⁰ *Buckley*, 424 U.S. at 66-68.

anonymous involvement in the political process, are a counterweight to these goals, however.²¹ Several members of the Supreme Court have also indicated that the Constitution may limit the permissible restrictions on political activity if there is sufficient evidence that the restrictions reduce competitiveness in elections.²² The need to strike a balance between these various concerns has led, among other results, to different rules for candidates, political parties, and other political committees on one hand, and persons acting independently of such entities on the other hand.

1. Rules for Candidates, Political Parties, and Other Political Committees

Currently, election laws limit the sources and the amounts of contributions to candidates,²³ political parties, and other political committees (defined below) and require detailed disclosure of most contributions received and expenditures made. Congress also attempted to limit the amount of expenditures by candidates and political parties, but in the landmark decision of *Buckley v. Valeo*, the Supreme Court struck down such limits as unconstitutional.²⁴

²¹ See *id.* at 14-15, 68. For example, the First Amendment's freedom of speech clause bars laws that prohibit the distribution of anonymous documents that seek to influence voters with respect to ballot measures. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353-56 (1995) (distinguishing *Buckley* because the use of anonymous leaflets does not give the appearance of corruption and is a more traditional and direct form of speech than monetary contribution). But see *Majors v. Abell*, 361 F.3d 349, 355 (7th Cir. 2004) (distinguishing *McIntyre* and refusing to strike down an Indiana statute that required any advertisement expressly advocating the election or defeat of an identified candidate to include a disclaimer identifying who paid for the ad).

²² *Randall v. Sorrell*, 126 S. Ct. 2479, 2495 (2006) (Breyer, J., plurality opinion); see also *Buckley*, 424 U.S. at 30-35 (rejecting a challenge to FECA's contribution limits based on the argument that they discriminated between incumbents and challengers, in part because no evidence showed that this was in fact their effect). Ensuring competitiveness in elections might also be a sufficient governmental interest to support the constitutionality of certain restrictions if sufficient evidence demonstrates that the restrictions would promote such competitiveness. See, e.g., Richard Briffault, *The Return of Spending Limits: Campaign Finance After Landell v. Sorrell*, 32 FORDHAM URB. L.J. 399, 433-35 (2005) (arguing that ensuring competitive elections may be sufficient grounds to support reasonable spending limits).

²³ For purposes of this Article, the term "candidates" includes candidate campaign committees.

²⁴ *Buckley*, 424 U.S. at 58-59; see also *Randall*, 126 S. Ct. at 2490-91 (Breyer, J., plurality opinion) (joined by Roberts, C.J.) (refusing to revisit or limit the holding in *Buckley*); *id.* at 2501 (Kennedy, J., concurring) (reaffirming *Buckley*); *id.* at 2502 (Thomas, J., concurring) (joined by Scalia, J.) (arguing that *Buckley* should be replaced by an even stronger standard more protective of free speech).

Limits. The limits on *sources* of contributions include longstanding prohibitions of corporate and union contributions to candidates.²⁵ Prior to the enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA),²⁶ such entities could make contributions to political parties, but the 2002 law barred such “soft money” contributions to national political parties and ended the ability of state and local political party committees to use such contributions for most activities related to federal elections.²⁷ These prohibitions also extend to political committees other than candidate campaign committees and political party committees, such as political action committees, or “PACs.”²⁸ The definition of a political committee under FECA, as interpreted by the Supreme Court in *Buckley*, is an organization that is either under the control of a candidate or has a “major purpose” to nominate or elect a (federal) candidate, *and* which either receives \$1000 in contributions or makes \$1000 in expenditures during a single calendar year.²⁹ This definition is narrower than it first appears because the FEC, in the wake of *Buckley*, interpreted “expenditures” in this context as being limited to expenditures for campaign contributions and express advocacy. The FEC applied this limited definition both to the \$1000 threshold and the major purpose test, making that test whether the major purpose of the committee is to make campaign contributions and/or engage in express advocacy.³⁰

²⁵ See 2 U.S.C. § 441b(a) (2000). Congress enacted the ban on corporate contributions in 1907, *see* Act of Jan. 26, 1907, ch. 420, 34 Stat. 864, and the ban on union contributions in 1943, *see* War Labor Disputes Act, ch. 144, sec. 9, § 313, 57 Stat. 163, 167-68 (1943). Similar prohibitions also now exist for government contractors, *see* 2 U.S.C. § 441c(a)(1), and foreign nationals who are not permanent residents, *see id.* § 441e.

²⁶ Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C.). With only a few minor exceptions not relevant here, the Supreme Court found BCRA’s provisions to be constitutional. *See generally* *McConnell v. FEC*, 540 U.S. 93 (2003).

²⁷ Bipartisan Campaign Reform Act § 101, 116 Stat. at 82-86 (codified at 2 U.S.C. §§ 431, 441i (Supp. IV 2004)). Soft money is money that is not subject to FECA’s limitations on the sources and amounts of contributions; contrastingly, hard money is subject to those limitations and so is harder to raise. *See* Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in *THE NEW CAMPAIGN FINANCE SOURCEBOOK* 7, 29 (2005).

²⁸ *See* Corrado, *supra* note 27, at 18 (describing the origin of the “PAC” label).

²⁹ 2 U.S.C. § 431(4); *Buckley*, 424 U.S. at 79; *see also* Polsky & Charles, *supra* note 12, at 1004 (describing the *Buckley* Court’s “redefinition of political committee”).

³⁰ *See* Briffault, *supra* note 12, at 957-58. Both a close reading of *Buckley*, *see* Polsky & Charles, *supra* note 12, at 1004 & n.36, and the *McConnell* decision, in which the Supreme Court upheld as constitutional restrictions on funding sources for certain communications that did not contain express advocacy, *McConnell*, 540 U.S. at 206-07, raise questions about the FEC’s interpretation, but the FEC has maintained this interpretation. *See* Briffault, *supra* note 12, at 970-73 (describing the FEC’s ultimate rejection of a broader definition for political committee).

The limits on contribution *amounts* mean that even persons who are allowed to make contributions to candidates, political parties, and other political committees – individuals who are U.S. citizens or permanent residents, political party committees, or PACs – can only contribute a limited amount to each candidate or organization. Many of the limits are subject to adjustment for inflation, but for individuals during the 2007-2008 election cycle, the limit is \$2300 per candidate per election, higher annual amounts for contributions to political party committees and PACs, and \$108,200 overall for all contributions during the election cycle.³¹ Similar limits apply to contributions by political parties and PACs to candidates and each other, although there are no limits on transfers among political party committees.³² Further, only national party committees have an aggregate limit, and then only with respect to Senate candidates.³³

The overall effect of these limits on sources and amounts is to make it harder for candidates, political parties, and other political committees involved in elections to raise large amounts – hence the term “hard money” for funds subject to these limits. Despite that term, political parties have shown a remarkable ability to raise such funds: in 2004 the national party committees raised over \$1.2 billion in hard money, as compared with the slightly less than \$1.1 billion in *both* hard and soft money they raised during 2000, the last presidential election year during which the parties could raise soft money.³⁴

Disclosure. With respect to disclosure, current law requires candidates, political parties, and other political committees to provide detailed and frequent public filings identifying contributors who give more than \$200 and recipients of expenditures who receive more than \$200.³⁵ The FEC makes these filings available to the public on the Internet through a searchable

³¹ See 2 U.S.C. § 441a(a)(1), (3) (2000 & Supp. IV 2004) (providing the non-inflation-adjusted limits on contributions by individuals); Price Index Increases for Expenditure and Contribution Limitations, 72 Fed. Reg. 5294 (Feb. 5, 2007) (providing the inflation-adjusted limits for the 2007-2008 election cycle).

³² See 2 U.S.C. § 441a(a)(1), (2), (4) (listing the non-inflation-adjusted limits on contributions by entities other than individuals); Price Index Increases for Expenditure and Contribution Limitations, 70 Fed. Reg. 11,658 (Mar. 9, 2005) (listing the inflation-adjusted limits for the 2005-2006 election cycle).

³³ See 2 U.S.C. § 441a(h).

³⁴ Anthony Corrado, *Party Finance in the Wake of BCRA: An Overview*, in THE ELECTION AFTER REFORM 19, 26 tbl.2.1 (Michael J. Malbin ed., 2006). The parties were almost as successful in non-presidential election years, raising slightly over \$900 million in hard money during the 2005-2006 election cycle, as compared to slightly over one billion dollars in both hard and soft money during the 2001-2002 election cycle. Press Release, FEC, Party Financial Activity Summarized for the 2006 Election Cycle (Mar. 7, 2007), <http://www.fec.gov/press/press2007/partyfinal2006/20070307party.shtml>.

³⁵ 2 U.S.C. § 434(a)(4), (b)(3)(A), (b)(5)(A).

database.³⁶ Individual contributors are identified not only by name, but also by address and employer, thereby making it relatively easy both to verify compliance with the above restrictions and for the public to identify the supporters of a particular candidate, party, or other political committee.³⁷

2. Rules for Independent Actors

Individuals and groups acting independently of candidates and political party committees and that are not political committees under the FEC's narrow definition face a less extensive set of restrictions and disclosure requirements. First and most importantly, such persons are affected by election law only if they make an "independent expenditure" or "electioneering communication."³⁸

In *Buckley*, the Supreme Court narrowly defined independent expenditures as "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."³⁹ In doing so, the Court listed what became known as the "magic words" that meet this express advocacy requirement.⁴⁰ While the FEC has consistently sought to include within the reach of the election laws any communication that "taken as a whole and with limited reference to external events . . . could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s),"⁴¹ not just communications containing the *Buckley* magic words, the courts have almost uniformly rejected this effort.⁴²

³⁶ The database is accessible at FEC, Campaign Finance Reports and Data, <http://www.fec.gov/disclosure.shtml> (last visited June 1, 2007).

³⁷ This is particularly true given that third parties have used the FEC database to create even more user-friendly searchable databases. See, e.g., Eyebeam R&D, Fundrace 2004, <http://www.fundrace.org> (last visited June 1, 2007) (allowing free searches of contributors by zip code so visitors can identify their neighbors who have made reported contributions to federal candidates, political parties, or other political committees).

³⁸ See 2 U.S.C. §§ 431(17), 434(f)(3) (Supp. IV 2004).

³⁹ *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (per curiam). The Supreme Court also applied this express terms test to the definition of "expenditure" for the purposes of individuals and groups other than candidates and political committees. See *id.* at 80.

⁴⁰ See *id.* at 44 n.52 (restricting the express advocacy requirement to the use of words "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'").

⁴¹ 11 C.F.R. § 100.22(b) (2006).

⁴² See, e.g., *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 390-92 (4th Cir. 2001) (determining that the magic words test can only be applied to words which in and of themselves advocate the election or defeat of a particular candidate); *Me. Right to Life Comm., Inc. v. FEC*, 98 F.3d 1, 1 (1st Cir. 1996) (per curiam) (refusing to expand the reach of the magic words test); see also *Chamber of Commerce v. Moore*, 288 F.3d 187, 193-96 (5th Cir. 2002) (citing cases striking down both this regulation and similar state provisions as unconstitutional). But see *FEC v. Furgatch*, 807 F.2d 857, 861-64 (9th Cir. 1987)

In response to the ease with which an organization or individual could design a communication to avoid express advocacy classification while still clearly seeking to influence the election of a candidate,⁴³ Congress in 2002 created a new category of communications subject to restrictions and disclosure: electioneering communications.⁴⁴ Electioneering communications are “broadcast, cable, or satellite communication[s] which . . . refer[] to a clearly identified candidate” within a short period before a primary or general election (or nominating convention or caucus) and reach the relevant electorate.⁴⁵ Other activities that are done independently of candidates and political parties by individuals or groups other than political committees remain free from any restrictions or disclosure requirements under election law.⁴⁶

Limits. Corporations and labor unions generally cannot pay for either independent expenditures or electioneering communications.⁴⁷ There is, however, an exception for so-called “Massachusetts Citizens for Life” or

(upholding the broader definition of express advocacy, which the FEC then incorporated into the cited regulation).

⁴³ See *Buckley*, 424 U.S. at 45 (recognizing the ease of creating such an advertisement). The following October 1996 advertisement about Bill Yellowtail, then a Democratic candidate for Congress in Montana, and paid for by Citizens for Reform, an independent organization not registered as a political committee, is illustrative of this concern:

Who is Bill Yellowtail? He preaches family values but he took a swing at his wife. And Yellowtail's explanation? He only slapped her but her nose was not broken. He talks law and order but is himself a convicted criminal. And though he talks about protecting children, Yellowtail failed to make his own child support payments and then voted against child support enforcement. Call Bill Yellowtail and tell him we don't approve of his wrongful behavior.

Washington Week (PBS television broadcast Nov. 7, 1997) [hereinafter PBS Transcript], available at <http://www.pbs.org/weta/washingtonweek/transcripts/transcript971107.html>; see also *McConnell v. FEC*, 540 U.S. 93, 193 n.78 (2003) (citing this advertisement as a “striking example” of an advertisement that while not expressly urging the viewer to vote for or against a candidate, was clearly intended to influence a candidate's election). Bill Yellowtail lost the election.

⁴⁴ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 201-204, 116 Stat. 81, 88-92 (codified at 2 U.S.C. §§ 434, 441a, 441b (Supp. IV 2004)).

⁴⁵ 2 U.S.C. § 434(f)(3)(A)(i) (Supp. IV 2004). The Supreme Court recently affirmed a decision of the U.S. District Court for the District of Columbia that certain ads, while technically falling within the definition of an electioneering communication, qualified for an as applied exception to the restrictions imposed on such communications under the First Amendment. See generally *FEC v. Wis. Right to Life, Inc.*, Nos. 06-969, 06-970, 2007 U.S. LEXIS 8515 (June 25, 2007).

⁴⁶ To be independent, expenditures must not be coordinated with candidates or political parties. See 2 U.S.C. § 441a(a)(7)(B) (2000 & Supp. IV 2004) (treating expenditures that are coordinated with a candidate as contributions to the candidate's campaign and thus subject to FECA's limits on such contributions).

⁴⁷ See *id.* § 441b(a), (b)(2), (c).

“MCFL” corporations. These corporations are named after the Supreme Court case that created the exception, *FEC v. Massachusetts Citizens for Life, Inc.*,⁴⁸ in which the Court held that the election law prohibition on corporate funding of independent express advocacy was unconstitutional as applied to organizations: (1) formed to promote political ideas and not to engage in business activities; (2) having no shareholders or other persons with a claim to the organization’s assets or earnings; and (3) not established by a business corporation or labor union and not accepting contributions from such organizations.⁴⁹ The FEC subsequently issued regulations embodying its interpretation of this decision.⁵⁰ The Supreme Court has also extended this exception to electioneering communications.⁵¹

There are, however, no limits on the amount of contributions that an eligible contributor – MCFL entities and individuals who are U.S. citizens or permanent residents – may provide to pay for independent expenditures or electioneering communications.⁵² Thus even with respect to the relatively narrow set of activities covered by election law, independent actors have a significant fundraising advantage. There are also no limits on total expenditures, as the Supreme Court struck down such limits as unconstitutional at the same time that it invalidated limits on expenditures by candidates and political parties.⁵³

Disclosure. Current law also requires individuals and entities that make independent expenditures or electioneering communications to file detailed reports relating to those activities. For independent expenditures, these reports must be filed promptly once certain expenditure thresholds are met and require the same level of detail with respect to contributions received and expenditures

⁴⁸ 479 U.S. 238 (1986).

⁴⁹ *Id.* at 263-64.

⁵⁰ See Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292 (July 6, 1995) (codified at 11 C.F.R. pts. 100, 106, 109, 114) (adding numerous provisions to 11 C.F.R., including a section dealing with the exemption for nonprofit corporations).

⁵¹ *McConnell v. FEC*, 540 U.S. 93, 210-11 (2003) (recognizing that Congress intended to exempt MCFL entities from the ban on paying for electioneering communications). The 2002 electioneering communications provisions actually contain an MCFL-type exception, codified at 2 U.S.C. § 441b(c)(2) (Supp. IV 2004), but in an example of the convoluted history of those provisions, the exception is completely eliminated by another provision, codified at 2 U.S.C. § 441b(c)(6) (Supp. IV 2004).

⁵² In theory PACs could also be contributors, but given that PACs can only raise hard money, it would make little sense for a PAC to use its limited hard money to support an expenditure that was not subject to the hard money contribution limits. Contributions by candidates or political parties would raise coordination, and therefore lack of independence, concerns. See *supra* note 46 (describing the treatment of coordinated expenditures).

⁵³ *Buckley v. Valeo*, 424 U.S. 1, 52 (1976) (per curiam).

made as the reports for political committees.⁵⁴ For electioneering communications, these reports require detailed information regarding expenditures of more than \$200, but information regarding contributors is only required if a donor's aggregate contributions are \$1000 or more.⁵⁵ The person making electioneering communications must file such reports promptly after reaching a \$10,000 expenditure threshold.⁵⁶

Therefore, individuals and organizations other than political committees acting independently of candidates and political parties have similar disclosure requirements and limits on *sources* of funds as candidates, political parties, and other political committees. Such individual actors are not, however, subject to any limits on the *amounts* given by permitted contributors, in contrast to candidates, political parties, and other political committees.

B. Tax Law

The heart of the tax law provisions addressing political activity is the longstanding rule that no deduction is allowed for expenditures for political activity.⁵⁷ Political activity is generally defined as activity that supports or opposes a candidate for elected public office.⁵⁸ To prevent circumvention of this rule, Congress also prohibited charities that are eligible to receive tax deductible contributions from engaging in activities that support or oppose candidates.⁵⁹ Similarly, Congress required trade associations and similar

⁵⁴ See 2 U.S.C. § 434(c), (g) (2000 & Supp. IV 2004) (requiring reports from persons making independent expenditures of \$10,000 or more (\$1000 or more if twenty days or less before an election) within forty-eight hours of the expenditures (twenty-four hours if twenty days or less before an election)).

⁵⁵ *Id.* § 434(f)(2).

⁵⁶ *Id.* § 434(f)(1) (requiring reports within twenty-four hours of reaching the threshold).

⁵⁷ See 26 U.S.C. § 162(e) (2000). See generally Gregg D. Polsky, *A Tax Lawyer's Perspective on Section 527 Organizations*, 28 CARDOZO L. REV. 1773 (2007) (providing a detailed description of this rule). The Treasury Department issued the first version of this rule in 1915. See T.D. 2137, 17 Treas. Dec. Int. Rev. 57-58 (1915). The only exception to this rule was when Congress chose to provide a small credit and a small deduction for political contributions to encourage political participation in the 1970s and 1980s. See Revenue Act of 1971, Pub. L. No. 92-178, §§ 701-702, 85 Stat. 497, 560-62 (repealed in 1978 (deduction) and 1986 (credit)).

⁵⁸ See *infra* Part I.B.2 (discussing the tax law definition of "political activity").

⁵⁹ See 26 U.S.C. §§ 170(c)(2)(D), 501(c)(3). Even before Congress codified the prohibition in 1954, political activities were thought to be inconsistent with charitable status. See *Slee v. Comm'r*, 42 F.2d 184, 185 (2d Cir. 1930) (upholding the denial of deductible contributions under the predecessor to § 501(c)(3)); 9 JACOB MERTENS, JR., *THE LAW OF FEDERAL INCOME TAXATION* § 34:05, at 22 (rev. vol. 1983) ("[The 1954 codification] merely expressly stated what had always been understood to be the law. Political campaigns did not fit within any of the specified purposes listed in the section."). But see Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1,

entities to either pay tax on dues paid to them to the extent the dues are used for political activities or to notify the dues-payers and other contributors that the portion of their payments used for such activities is not deductible as a business expense.⁶⁰

The reasons for this no-deduction rule are unclear. Several respected commentators have suggested that the rule's origins lie in the same concerns about corruption and political equality that motivated election law.⁶¹ The lack of any administrative or legislative history for this rule makes it impossible to confirm whether this was in fact the case, however.⁶² A possible alternate explanation is that Congress simply did not view political activities as a trade

23-29 (2003) (arguing that the prohibition arose primarily because of then Senator Lyndon Johnson's anger toward certain political opponents); Ann M. Murphy, *Campaign Signs and the Collection Plate – Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35, 54, 62 (2003) (arguing that the prohibition arose from a longstanding suspicion of political activities by charities that was strengthened by the McCarthy paranoia of the time, not primarily because of Senator Johnson's desire to stop his political opponents). The rule, however, was not absolutely clear, and some charities almost certainly engaged in what today clearly would be viewed as political activities in the belief that the law permitted them to do so. See Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733, 759-65 (2001) (detailing how the IRS's apparent inability to penalize a charity that had engaged in political activity opposing then Senator Lyndon Johnson's re-election campaign led, in part, to Senator Johnson's introduction of the amendment codifying the prohibition in § 501(c)(3)).

⁶⁰ See 26 U.S.C. §§ 162(e)(3), 6033(e).

⁶¹ See, e.g., 1 BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 20.3.7, at 20-58 (2d ed. 1989) (citing court cases that referenced the potentially negative role of money in politics in upholding the rule); William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 364 (1972) (stating, without citation, that the reason for limiting the deductibility of political contributions is fear of "oppression if wealthy people are able to dominate the political process"); R. T. Boehm, *Taxes and Politics*, 22 TAX L. REV. 369, 412 (1967) (arguing that the initial rule denying a deduction for political expenditures arose from a general attempt to limit the involvement of corporations in politics); Eric M. Zolt, *Deterrence Via Taxation: A Critical Analysis of Tax Penalty Provisions*, 37 UCLA L. REV. 343, 353-54 (1989) (including the denial of deductions for "business political campaign expenditures" and "certain worthless debts owed by political parties" in a list of tax provisions Congress has enacted to increase the costs of undesirable activities); see also *Comm'r v. Heininger*, 320 U.S. 467, 473 (1943) (suggesting in dicta that the denial of deductibility is rooted in sharply defined, but unstated, national policies).

⁶² Neither the pre-1962 administrative pronouncements nor the codification in 1962 provide any explanation for continuing the non-deductibility rule. See, e.g., S. REP. NO. 87-1881, at 21-24 (1962); H.R. REP. NO. 87-1447, at 16-18 (1962); T.D. 2137, 17 Treas. Dec. Int. Rev. 57-58; Treas. Reg. No. 33, art. 143 (1918), reprinted in 132 INTERNAL REVENUE ACTS OF THE UNITED STATES, 1909-1950: LEGISLATIVE HISTORIES, LAWS, AND ADMINISTRATIVE DOCUMENTS 75 (Bernard D. Reams, Jr. ed., 1979); I.T. 3276, 1939-1 C.B. 108.

or business, and therefore deemed them an inappropriate subject for a business expense deduction or any other existing deduction.⁶³

But regardless of the reasons for its adoption, the rule still left two issues unsettled. First, what should be the tax treatment of organizations primarily engaged in political activity? And second, what exactly constitutes political activity?

1. The Origin of 527s

Trying to address the first question, the Treasury Department initially wrestled with the extent to which organizations that otherwise qualified for tax-exempt but not charitable status – and so to which contributions are not deductible as charitable contributions – could engage in political activity. Examples of such organizations are “social welfare” organizations that are tax-exempt under § 501(c)(4) of the Internal Revenue Code (the Code), such as the Sierra Club and the National Rifle Association, labor organizations that are tax-exempt under § 501(c)(5), such as the AFL-CIO, and chambers of commerce and trade associations that are tax-exempt under § 501(c)(6), such as the U.S. Chamber of Commerce and the Alliance of Automobile Manufacturers. The Treasury Department ultimately concluded, after some flip-flopping, that such organizations would be tax-exempt as long as their primary activity furthered the social welfare, labor, or business purpose that justified their tax-exempt status but that political activity could not count toward this primary activity requirement.⁶⁴ In other words, political activity had to be no more than a secondary activity of such entities if they wished to remain tax-exempt.⁶⁵ A corollary to this rule was therefore that organizations engaged primarily in political activity *were* taxable.⁶⁶

⁶³ See S. REP. NO. 93-1357, at 26-27 (1974) (stating, in the context of adding § 527, that political activity is not a trade or business); H.R. REP. NO. 93-1502, at 104-05 (1974) (same). Tax deductions are generally only available if specifically provided by Congress. *Comm’r v. Tellier*, 383 U.S. 687, 693-95 (1966); *Biazar v. Comm’r*, 88 T.C.M. (CCH) 513, 515 (2004) (stating that deductions are a matter of legislative grace); see also 26 U.S.C. § 161 (stating that deductions must be specified).

⁶⁴ See I.R.S. Gen. Couns. Mem. 34,233 (Dec. 3, 1969) (reviewing the shifting positions of the IRS and the IRS Chief Counsel’s office before ultimately reaching this conclusion); T.D. 6391, 1959-2 C.B. 139, 145-46 (explaining that comments had been considered and reaching the conclusion that social welfare organizations under § 501(c)(4) were tax-exempt as long as they were not primarily engaged in political activity). The IRS recently confirmed in an internal training publication that this remains its position. John Francis Reilly & Barbara A. Braig Allen, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, EXEMPT ORGANIZATIONS: TECHNICAL INSTRUCTION PROGRAM FOR FY 2003, at L-1 to L-3 (2002), available at <http://www.irs.gov/pub/irs-tege/eotopicl03.pdf>.

⁶⁵ Exactly how to determine what is an organization’s “primary” activity remains unclear. See, e.g., *ABA Members Comment on Exempt Organizations and Politics*, 45 EXEMPT ORG. TAX REV. 136, 152-54 (2004) [hereinafter *ABA Members Comment*]

This conclusion did not fully resolve the tax situation of organizations engaged primarily in political activity, however, because there still remained the question of whether contributions to such organizations – presumably the vast majority of their income – should be included in their taxable income. The IRS initially took the position that while such organizations were not exempt from tax, such contributions were excluded from their taxable income as “gifts.”⁶⁷ But the government created some uncertainty on this point when it attempted to tax the Communist Party.⁶⁸ To finally resolve the issue, Congress enacted the now-infamous § 527.⁶⁹

Section 527 resolved the tax exemption issue by providing tax exemption for organizations primarily engaged in political activity, but only with respect to contributions received by such organizations that are set aside for political activity.⁷⁰ Other contributions and income from other sources are still taxable.⁷¹ Section 527 also subjects to tax – at the highest corporate tax rate – the net investment income of other tax-exempt organizations to the extent of the lesser of those organizations’ political activity expenditures or amount of net investment income.⁷²

The effect of § 527 was therefore to clarify the tax status of organizations engaged primarily in political activity. At the same time, it ensured that neither those organizations nor other tax-exempt organizations permitted to engage in political activity as a secondary activity – primarily social welfare organizations, labor organizations, and trade associations – could use their tax-exempt status to generate income that escaped taxation and was then used for political activity. By placing 527s and other tax-exempt organizations on the same tax footing, Congress hoped to encourage those other organizations to create 527s for their political activities “to the benefit both of the organization and the administration of the tax laws.”⁷³ Combined with the rule that

(describing the uncertain definition of “primary” in this context and proposing the creation of a bright-line safe harbor).

⁶⁶ See I.R.S. Gen. Couns. Mem. 33,495 (Apr. 27, 1967) (“The [Internal Revenue] Service has maintained the position that a political party does not qualify for an exemption from tax under section 501(c)(4), or indeed that it is specifically exempted from taxation under any other section of the Code.”).

⁶⁷ I.T. 3276, 1939-1 C.B. 108.

⁶⁸ See *Communist Party of the U.S.A. v. Comm’r*, 373 F.2d 682, 684 & n.2 (D.C. Cir. 1967) (noting that despite the government’s attempt to limit to the Communist Party the assertion that a political party could receive taxable dues instead of non-taxable contributions, the distinction between dues and contributions would now be of interest to all political parties).

⁶⁹ Act of Jan. 3, 1975, Pub. L. No. 93-625, § 10, 88 Stat. 2108, 2116-19 (codified as amended at 26 U.S.C. § 527 (2000 & Supp. IV 2004)).

⁷⁰ 26 U.S.C. § 527(a), (c)(1)(A), (c)(3), (e)(1)-(2) (2000).

⁷¹ *Id.* § 527(b), (c)(1).

⁷² *Id.* § 527(f).

⁷³ S. REP. NO. 93-1357, at 30 (1974); see also H.R. REP. NO. 93-1502, at 108 (1974).

contributions to either 527s or other types of non-charitable tax-exempt organizations that engage in political activity are not tax deductible, this rule effectively requires all taxpayers to use after-tax dollars for political activity.⁷⁴

One major loose end still exists with respect to the tax treatment of contributions for political activities, however. Simultaneously with the enactment of § 527, Congress also clarified that donations to 527s would not be subject to the gift tax (which arguably would have otherwise applied to contributions from individuals).⁷⁵ Congress left unclear, however, whether donations to other non-charitable tax-exempt organizations are subject to the gift tax, regardless of whether the contributions are then used for political activities. The IRS's position is that the gift tax does apply to such contributions,⁷⁶ but there are reasons to believe that this position is both legally unsound⁷⁷ and not generally complied with or enforced in practice.⁷⁸

2. The Tax Definition of Political Activity

While § 527 resolved the tax status of organizations engaged primarily in political activity, it did not completely resolve how broadly political activity should be defined for purposes of either § 527 or the other Code sections and regulations addressing political activity. That task was left primarily to the IRS.

⁷⁴ See *supra* notes 57, 60 and accompanying text (explaining that contributions and dues to organizations are not tax-exempt if that money is used for political activity). The § 527 legislation also taxed contributors on any built-in gain if they contributed appreciated property to a 527, thereby preventing such gain from avoiding taxation. Act of Jan. 3, 1975 § 13, 88 Stat. at 2120-21 (codified at 26 U.S.C. § 84). There are some gaps in the coverage of this rule, although none appear to be major. These gaps include the fact that non-charitable tax-exempt organizations can earn income that is not subject to tax under 26 U.S.C. § 527(f) from trades or businesses that are substantially related to those organizations' primary purposes and then use those funds for political activity. In addition, veterans organizations are eligible to receive tax-deductible contributions under 26 U.S.C. § 170(a), (c)(3), but are not subject to any tax law restrictions on their political activities.

⁷⁵ Act of Jan. 3, 1975 § 14, 88 Stat. at 2121 (amending 26 U.S.C. § 2501(a)).

⁷⁶ Rev. Rul. 82-216, 1982-2 C.B. 220 ("[G]ratuitous transfers to persons other than [§ 527] organizations . . . are subject to the gift tax absent any specific statute to the contrary, even though the transfers may be motivated by a desire to advance the donor's own social, political or charitable goals.").

⁷⁷ See generally Barbara Rhomberg, *Constitutional Issues Cloud the Gift Taxation of Section 501(c)(4) Contributions*, 15 TAX'N EXEMPTS 164 (2004); Barbara Rhomberg, *The Law Remains Unsettled on Gift Taxation of Section 501(c)(4) Contributions*, 15 TAX'N EXEMPTS 62 (2003).

⁷⁸ *ABA Members Comment*, *supra* note 65, at 142-43 (describing the apparent lack of knowledge about, and government enforcement of, the gift tax on contributions to § 501(c)(4) organizations).

The various tax provisions discussing political activity use varying language to describe that activity.⁷⁹ In practice, however, the IRS has repeatedly indicated that the same range of activities is implicated by these various references.⁸⁰ As stated in the most recent fact sheet issued by the IRS in this area, that set of activities is broadly defined as “any and all activities that favor or oppose one or more candidates for public office.”⁸¹ It is irrelevant whether the candidates are seeking federal office; the definition also encompasses activity with respect to candidates for local, state, and even foreign elected public office.⁸² The fact sheet further states, consistent with prior IRS

⁷⁹ See 26 U.S.C. § 162(e)(1)(B) (2000) (describing political activity as “participation in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office”); *id.* § 501(c)(3) (suggesting that to “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office” would qualify as political activity); *id.* § 527(e)(2) (describing political activity as “influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed”); Treas. Reg. § 1.501(c)(4)-1 (as amended in 1990) (including within political activity the “direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office”).

⁸⁰ See IRS, INTERNAL REVENUE MANUAL ¶ 7.25.4.7 (1999), available at <http://www.irs.gov/irm/part7/ch10s07.html> (“The rules determining what constitutes intervention in a political campaign for an IRC 501(c)(4) organization are the same as those governing IRC 501(c)(3) organizations.”); *ABA Members Comment*, *supra* note 65, at 144-45 (discussing IRS rulings indicating this convergence); Frances R. Hill, *Probing the Limits of Section 527 To Design a New Campaign Finance Vehicle*, 86 TAX NOTES 387, 391 (2000) (explaining the IRS’s reliance on guidance issued with respect to § 501(c)(3) to determine whether an organization qualified as a 527); Kingsley & Pomeranz, *supra* note 12, at 84-88 (discussing IRS rulings indicating this convergence). There is no similar authority with respect to § 162(e), but the similarity between its language and the language used in both § 501(c)(3) and the regulations under § 501(c)(4) strongly suggests that the same definition applies. See *supra* note 79. The one major exception is that “exempt function” activities under § 527 include activities designed to support or oppose candidates for non-elected public offices and for offices with political organizations. See 26 U.S.C. § 527(e)(2); Kingsley & Pomeranz, *supra* note 12, at 88-91. It is generally assumed that few if any 527s engage in such activities to any significant degree, however, particularly given that even charities (using tax deductible contributions) can, to a limited degree, engage in such activity. See I.R.S. Announcement 88-114, 1998-37 I.R.B. 26 (seeking public comments on, *inter alia*, whether expenditures for such activities may be subject to tax under § 527 and stating that any such tax shall only be applied prospectively once the IRS decides the issue, which it has yet to do).

⁸¹ I.R.S. Fact Sheet FS-2006-17 (Feb. 2006), available at <http://www.irs.gov/newsroom/article/0,,id=154712,00.html>.

⁸² See Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 1990) (including candidates for national, state, or local office within the prohibition on charities engaging in political activity); James F. Bloom et al., *Foreign Activities of Domestic Charities and Foreign*

guidance,⁸³ that while some activities will clearly be political on their face, others will require “evaluation of all the facts and circumstances” to determine if they are in fact political.⁸⁴

A good example of how this broad definition contrasts with the definition of election-related activity under election law is found in the treatment by these two bodies of law of candidate-related communications. As noted above, election law only reaches communications that either qualify as “express advocacy” because they unambiguously call for recipients to vote for or against a particular candidate⁸⁵ or fall within the narrow definition of “electioneering communications” (limited to broadcast, cable, or satellite communications aired within a short timeframe before an election and clearly referencing a federal candidate).⁸⁶ So, for example, a television ad that is highly critical of a candidate’s position on an issue but does not explicitly reference the upcoming election or voting and is not run within the electioneering communication time windows (say after the primary election but sixty-five days before the general election) would not be reached by election law.⁸⁷ Tax law, in contrast, determines whether such an “issue ad” is political activity (and so must be paid for with after-tax dollars) by looking at all of the relevant facts and circumstances, including the timing of the ad with respect to the election, the ad’s audience, whether the ad identifies the candidate’s position on an issue, whether that issue has been raised in the political campaign, and whether the ad relates to specific legislation that is currently pending.⁸⁸

The result of tax law’s facts and circumstances approach is that there is no general principle for determining if a given activity is in fact “political” for tax purposes.⁸⁹ Taxpayers and their advisers must instead make such a determination based on the mix of precedential and non-precedential guidance issued by the Treasury Department over the past several decades that discusses the particular activity at issue, whether issue ads, candidate questionnaires,

Charities, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY1992, at 1, 14 (1991), available at <http://www.irs.gov/pub/irs-tege/eotopick92.pdf> (stating that the prohibition against charities engaging in political activity applies in foreign countries as well).

⁸³ See, e.g., Rev. Rul. 2004-6, 2004-1 C.B. 328 (explaining that tax-exempt organizations may publicly advocate positions on public policy issues, but not for specific candidates).

⁸⁴ I.R.S. Fact Sheet FS-2006-17.

⁸⁵ See *supra* notes 39-42 and accompanying text.

⁸⁶ See *supra* notes 44-45 and accompanying text.

⁸⁷ The Bill Yellowtail ad mentioned earlier would fall within this description if it had been run sixty-five days before the general election. See *supra* note 43.

⁸⁸ See Rev. Rul. 2004-6.

⁸⁹ See *EO Committee of ABA Tax Section Offers Commentary on Politicking*, 11 EXEMPT ORG. TAX REV. 854, 856 (1995) (stating that the available rulings do not state “any unifying principle”); Kingsley & Pomeranz, *supra* note 12, at 64-71 (observing that the available rules “do not offer clear road signs, but rather mere examples”).

voter guides, candidate appearances, or voter registration drives, to name a few.⁹⁰ For activities that on their face do not support, oppose, or perhaps even mention a candidate, this uncertainty has allowed organizations to influence the classification of such activities in part based on the information made available to the IRS. For example, providing the IRS with a blueprint of how an organization's planned activity, non-political on its face, would affect elections was one means of having an organization classified as a 527 before the enactment of the disclosure rules made that status less desirable.⁹¹ The difficulty of applying this definition has, not surprisingly, led to a mixed record with respect to enforcing the tax rules for political activity, as detailed below.⁹²

C. *Combining Election Law and Tax Law*

The differences between the election law and tax law provisions governing political activity led to a relatively sharp separation between the two bodies of law in practice. Candidates, political parties, and PACs focused primarily on election law, as their only interaction with tax law was having to file a one-page IRS form if, and only if, they had sufficient non-contribution income to become subject to tax under § 527.⁹³ Individuals and business entities that chose to be involved in politics also probably focused primarily on election law, as the tax law was simple: no deduction permitted for political activity expenditures.

Tax-exempt entities, in contrast, tended to focus primarily on the tax law requirements. Charities avoided all "political activity," as defined broadly by the tax laws, and assumed, usually correctly, that they therefore were not engaging in any activities regulated by election law. Other types of tax-exempt organizations, such as social welfare groups, labor organizations, and trade associations, while perhaps aware of the activities governed by election law, generally avoided those activities. For the ones that decided to engage in such activities, the most common route was to establish a separate PAC to make campaign contributions so as to comply with the prohibition on the use of corporate and union treasury funds for such purposes.⁹⁴ With the enactment of § 527, such separate entities were also attractive because they could avoid

⁹⁰ See Judith E. Kindell & John Francis Reilly, *Election Year Issues*, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FY2002, at 335, 369-84 (2001), available at <http://www.irs.gov/charities/article/0,,id=96251,00.html> (summarizing the numerous IRS rulings applying the § 501(c)(3) definition of political activity to particular situations).

⁹¹ See Kingsley & Pomeranz, *supra* note 12, at 87 (highlighting the fact that private letter rulings on 527s often involved organizations that carefully and intentionally presented their activities as designed to influence the election of candidates for public office).

⁹² See *infra* Part III.C.1.

⁹³ See I.R.S. Form 1120-POL (2006), available at <http://www.irs.gov/pub/irs-pdf/fl1120pol.pdf>.

⁹⁴ See *supra* note 28.

owing any income tax by simply keeping their funds in non-interest-bearing checking accounts. But the rise of the so-called “stealth PAC” 527s led Congress to breach this separation.⁹⁵

Unlike most tax-exempt organizations that are required to file an annual information return, § 527 organizations were for many years not required to file any publicly available information returns with the IRS.⁹⁶ This lack of reporting was intentional, as Congress apparently assumed that the reporting requirements of federal or state election law would apply to § 527 organizations.⁹⁷ This assumption eventually proved incorrect, however, as organizations realized, and the IRS confirmed, that the range of political activities that could qualify an organization as tax-exempt under § 527 was much broader than the range of activities governed by federal or state election laws.⁹⁸ This inconsistency led to the creation of “stealth” 527s that were under no obligation to file publicly available reports under either election law or federal tax law.⁹⁹ While the exact scale of these stealth PACs’ operations is not known, reports indicate it was substantial.¹⁰⁰

⁹⁵ Previous overlaps between election law and tax law have not raised the same issues as the current and proposed overlaps relating to 527s. The presidential candidate public financing system is housed in the tax laws, but all authority over that system other than cutting the actual checks is given to the FEC, not the IRS or the Treasury Department. *See* 2 U.S.C. § 437c(b)(1) (2000) (including the relevant sections of the Internal Revenue Code in the laws the FEC is responsible to administer). The FEC also requires organizations seeking to qualify for the *Massachusetts Citizens for Life* exception to be tax-exempt as social welfare organizations, but since the characteristics listed by the Supreme Court in that decision tend to limit the exemption to social welfare organizations anyway, this requirement has not proven controversial. *See* 11 C.F.R. § 114.10(c) (2006); *supra* text accompanying note 49.

⁹⁶ *See* 26 U.S.C. § 6033(a)(1) (2000). The major exception to this annual filing requirement is for churches and church-related entities. *See id.* § 6033(a)(3)(A)(i).

⁹⁷ *See* Hill, *supra* note 80, at 387, 390 & n.20 (stating that “there appears to have been at least an implicit assumption that section 527 organizations would be subject to the FECA,” but also acknowledging that “[l]ittle thought was given to the relation between section 527 and the new FECA”).

⁹⁸ *See, e.g.,* I.R.S. Priv. Ltr. Rul. 96-52-026 (Oct. 1, 1996) (concluding that an organization qualified for tax-exempt status under § 527 even though it designed its election-related activities specifically to avoid falling within the reach of federal or state election laws); I.R.S. Priv. Ltr. Rul. 97-25-036 (Mar. 24, 1997) (same); I.R.S. Priv. Ltr. Rul. 98-08-037 (Nov. 21, 1997) (same). *See generally* Hill, *supra* note 80 (reviewing these rulings).

⁹⁹ *See, e.g.,* Hill, *supra* note 80 (describing the IRS rulings that permitted such 527s).

¹⁰⁰ *See, e.g.,* COMMON CAUSE, UNDER THE RADAR: THE ATTACK OF THE “STEALTH PACs” ON OUR NATION’S ELECTIONS 7-9 (2000), available at <http://web.archive.org/web/20011129075319/www.commoncause.org/publications/utr/stealth.pdf> (summarizing media reports regarding plans by 527s to spend in the aggregate tens of millions of dollars during 2000).

To correct this oversight, Congress in 2000 passed amendments to § 527 that not only imposed an annual IRS information return requirement, but also imposed a periodic reporting regime for contributors and expenditures mirroring the reporting regime for political committees under election law.¹⁰¹ This reporting requirement includes an obligation to inform the IRS of the 527's existence within twenty-four hours of its creation and an obligation to file a series of reports identifying the names, addresses, employers, and contribution amounts of all contributors who give \$200 or more during the year and the names, addresses, and expenditure amounts of all recipients of expenditures who receive \$500 or more during the year.¹⁰² Both the reporting schedule, with more frequent reports close to election dates, and the required information were based on the existing disclosure rules for PACs.¹⁰³ The IRS has created an Internet database of these filings.¹⁰⁴ The result of these new rules is that the IRS is now administering a disclosure regime that is very similar to the regime that the FEC administers with respect to candidate committees, political parties, and other political committees. The new rules therefore raise the question that is at the heart of this Article: if the government can and will regulate the activities of 527s by imposing disclosure requirements, is election law or tax law the best vehicle through which to do so?

This question has become even more important because of now-pending proposals to increase the regulation of 527s. The changes wrought to election law by Congress in 2002 appear to have led to a significant flow of funds into

¹⁰¹ Act of July 1, 2000, Pub. L. No. 106-230, 114 Stat. 477 (codified as amended in scattered sections of 26 U.S.C.). As later amended, there are exceptions for 527s that already provide similar disclosures under federal or state election law. 26 U.S.C. § 527(j)(5) (2000 & Supp. IV 2004).

¹⁰² 26 U.S.C. § 527(i)-(j).

¹⁰³ See H.R. REP. NO. 106-702, at 17 (2000). Compare 2 U.S.C. § 434(b)(3)(A) (2000) (requiring identification of each person, other than a political committee, who makes contributions aggregating more than \$200 during a calendar year (or election cycle with respect to an authorized committee of a candidate for federal office)), and *id.* § 434(b)(5)(A) (requiring identification of each person to whom expenditures aggregating in excess of \$200 are made during a calendar year), with 26 U.S.C. § 527(j)(3)(A) (requiring identification of each person to whom expenditures aggregating \$500 or more are made during a calendar year), and *id.* § 527(j)(3)(B) (requiring identification of each person who makes contributions aggregating \$200 or more during a calendar year); compare 2 U.S.C. § 434(a)(4) (2000 & Supp. IV 2004) (stating the reporting schedule for political committees other than authorized committees of a candidate), with 26 U.S.C. § 527(j)(2) (stating the reporting schedule for 527s). The limited legislative history does not explain why the threshold amount for reporting expenditures is \$500 for 527s instead of the \$200 amount that applies to PACs.

¹⁰⁴ See IRS, Political Organization Filing and Disclosure, <http://www.irs.gov/charities/political/article/0,,id=109644,00.html> (last visited June 1, 2007). Congress required such a database with respect to the names of 527s, see 26 U.S.C. § 6104(a)(3) (2000), but the IRS also included pdf files of the completed notification forms and periodic reports.

527s that are not subject to election law, approaching half-a-billion dollars in 2004, despite the new disclosure requirements.¹⁰⁵ This level of activity has led to calls to add funding restrictions on 527s by redefining “political committee” to include most 527s.¹⁰⁶ Such proposals would in effect create a bifurcated regulatory structure: the FEC would continue to be responsible for administering the political committee restrictions, but the IRS would continue to be responsible for administering § 527 and therefore making determinations regarding which organizations fall within that section.¹⁰⁷ Whether it is wise to

¹⁰⁵ Ctr. for Pub. Integrity, 527s in 2004 Shatter Previous Records for Political Fundraising (Dec. 16, 2004), <http://www.publicintegrity.org/527/report.aspx?aid=435> (reporting that 527s raised \$434 million in 2004); see also STEPHEN R. WEISSMAN & KARA D. RYAN, CAMPAIGN FIN. INST., *SOFT MONEY IN THE 2006 ELECTION AND THE OUTLOOK FOR 2008*, at 1-2 (2007), available at http://www.cfinst.org/books_reports/pdf/NP_SoftMoney_0608.pdf (reporting that 527s spent \$143 million during the 2005-2006 election cycle, as compared to the \$125 million they spent during the 2001-2002 cycle). The extent to which this flow represented an increase from earlier presidential election years is not completely clear because of the lack of reporting by 527s before the enactment of the new disclosure rules in the middle of 2000, although there are reports indicating that 527s planned to spend tens of millions of dollars in 2000. See COMMON CAUSE, *supra* note 100, at 7-9. Commentators have traced at least part of the increase to a shift in soft money contributions by labor unions from political parties to 527s, but the increase primarily appears to have come from individuals, particularly individuals making large contributions; corporations generally did not shift their soft money contributions from political parties to 527s but instead appeared to have simply stopped giving soft money. Briffault, *supra* note 12, at 963-64; Meredith A. Johnston, Note, *Stopping “Winks and Nods”: Limits on Coordination as a Means of Regulating 527 Organizations*, 81 N.Y.U. L. REV. 1166, 1180-81 (2006).

¹⁰⁶ See, e.g., 527 Reform Act of 2007, H.R. 420, 110th Cong. § 2 (2007); 527 Reform Act of 2007, S. 463, 110th Cong. § 2 (2007); 527 Reform Act of 2005, H.R. 513, 109th Cong. § 2 (2005); 527 Reform Act of 2005, S. 1053, 109th Cong. § 2 (2005). At least one state has already passed such a law. See W. VA. CODE ANN. § 3-8-12(g) (LexisNexis 2006) (limiting contributions to a 527 from any one person to \$2000 per election cycle). The FEC also considered changing the regulatory definition of political committee to encompass many if not most 527s, but ultimately chose not to do so. Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,063-65 (Nov. 23, 2004); see also Political Committee Status, 72 Fed. Reg. 5595, 5595-5602 (Feb. 7, 2007) (providing the FEC’s supplemental explanation and justification for not making this change in response to a court finding that its initial explanation was not sufficient).

¹⁰⁷ The legislation actually provides that it only applies to organizations that have given the notice to the IRS that they are in fact 527s, so it is unclear whether it would apply to an organization that is in fact described in § 527 but chooses not to provide that notice. See *infra* note 156 (noting the current uncertainty regarding whether 527 status is elective or mandatory). Presumably, however, the sponsors of the legislation do not expect organizations to be able to avoid the new definition simply by claiming, incorrectly, that they fall under another tax-exemption provision of the Code.

split responsibility in this manner requires considering the issue of institutional choice more generally.

II. HOW TO CHOOSE

The strikingly different historical roles of election law and tax law raise the question of whether Congress' mixing and matching of elements of both bodies of law in order to regulate 527 groups will be effective or wise. But answering that question requires stepping back from the particulars of 527s and their activities and focusing instead on the more general question of how to evaluate the strengths and weaknesses of different bodies of law with respect to regulating a particular set of activities. This Part develops a new framework for answering that question. While new, this framework draws in part on an existing body of scholarship that has focused primarily on where to house *spending* programs – whether in tax law or some other body of law – as opposed to where to house *regulatory* programs, such as a program designed to limit and disclose funding for political activity.

A. Choice Scholarship Generally

Scholars discussing the choice of regulators for pursuing a particular policy goal usually focus on which branch or level of government is the most appropriate institution to develop and adopt the laws to further the policy, or whether a government institution is the most appropriate vehicle as compared to the market.¹⁰⁸ These scholars therefore need to wrestle with issues such as federalism, the relative competencies of the courts versus the political branches, and the relative competencies of administrative agencies versus the legislature.¹⁰⁹ They do not usually focus on choosing between two substantive

¹⁰⁸ See, e.g., Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation – Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1231-46 (2003) (comparing state and federal courts and legislatures to each other and to the market); William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509, 529-32 (2000) (comparing institutions at federal, state, and local levels of government to each other and to the market); Joan MacLeod Heminway, *Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives*, 10 FORDHAM J. CORP. & FIN. L. 225, 262-307 (2005) (comparing Congress, the Securities and Exchange Commission, and the courts).

¹⁰⁹ See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994) (comparing the relative competencies of various institutions that might be responsible for regulation in a particular area of law); JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997) (employing public choice analysis to discuss the roles and competencies of various institutional actors involved in the legal regulatory process); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996) (arguing that the use of comparative institutional analysis represents a common ground shared by legal commentators belonging to a number of competing schools of thought). There is also literature regarding how interpretation of laws

bodies of law, both enacted by the same legislature but administered by different agencies.

The one significant exception is the extensive tax expenditures literature, which responds to congressional and state legislative uses of tax law to further non-tax policy goals.¹¹⁰ A tax expenditure is a tax law provision that departs from the “pure” version of tax law, under which all taxpayers are taxed on their true, economic income.¹¹¹ For example, the exclusion from taxable income of employer-paid health insurance and other employee benefits is generally considered a tax expenditure because, as an economic matter, such benefits represent income to the employees.¹¹²

Scholars in this area focus on determining whether identified non-tax policy goals are best accomplished through the tax law administered by the IRS or

is affected by the branch of government with the authority to interpret them. *See, e.g.*, Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081, 2083-85 (2005) (exploring court versus executive branch interpretation of the tax law); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003) (arguing in part that debates over legal interpretation can only be resolved by understanding the abilities and limitations of the institutions engaged in the interpretation).

¹¹⁰ *See, e.g.*, David A. Weisbach, *Tax Expenditures, Principal Agent Problems, and Redundancy* 1 n.1 (Univ. of Chi. Law Sch. John M. Olin Law & Econ. Working Paper Series, Paper No. 299, 2006), available at http://www.law.uchicago.edu/Lawecon/WkngPprs_251-300/299.pdf (providing a partial list of the extensive literature in the field of tax expenditures).

¹¹¹ Stanley Surrey stimulated this interest in tax expenditures, starting in 1967. *See* STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 3-4 (1973) [hereinafter SURREY, *PATHWAYS TO TAX REFORM*] (recounting his November 15, 1967, speech as Assistant Secretary of the Treasury for Tax Policy, which developed the concept of “tax expenditures”); Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 706-13 (1970) [hereinafter Surrey, *Tax Incentives*] (developing this concept further). *See generally* STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* (1985) (exploring the uses of this concept).

¹¹² *See* STAFF OF J. COMM. ON TAXATION, 109TH CONG., *ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2006-2010*, at 3-4 (Comm. Print 2006) (classifying such exclusions as tax expenditures). Both the federal government and many state governments have institutionalized the concept of tax expenditures by regularly producing annual tax expenditure budgets. *See* 2 U.S.C. § 639(c)(3) (2000) (requiring the Director of the Congressional Budget Office to issue reports projecting yearly tax expenditures for the next five fiscal years); 31 U.S.C. § 1105(a)(16) (2000) (requiring that a list of tax expenditures be included in the budget submitted by the President to Congress); STAFF OF J. COMM. ON TAXATION, *supra*, at 29-42 (providing tax expenditure estimates prepared for congressional committees); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2007*, at 285-328 (2006) (estimating tax expenditures for fiscal years 2005 through 2011); Herman P. Ayayo, *Tax Expenditures: Useful Economic Concept or Budgetary Dinosaur?*, 93 TAX NOTES 1152, 1153 (2001) (stating that thirty-three states prepare tax expenditure budgets on a regular basis).

through a different body of law administered by a different agency.¹¹³ But almost all of this scholarship focuses on goals that involve government economic aid, thus relying primarily on economic factors that do not apply to a regulatory program, such as regulating independent political activity.¹¹⁴ It is therefore necessary to develop a new framework that relies on non-economic factors to choose between bodies of substantive law when a regulatory – as opposed to economic – result is the goal. However, that new framework can draw on the existing tax expenditure literature to the degree that it has considered such non-economic factors.

B. *A Proposed Framework*

Bodies of substantive law may differ in the legislative processes that create them, the administrative agencies that interpret and enforce them, and the actual or likely effectiveness of that administration. A consideration of these differences reveals certain characteristics, detailed below, that are particularly salient to the question of where to house a regulatory program aimed at a specific set of activities.¹¹⁵ The tax expenditure literature discusses many of these characteristics, as noted in this portion of the Article, but often in a

¹¹³ See, e.g., Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 533-36 (1995) (discussing the earned income tax credit, an earnings subsidy to low-income workers provided through the tax system); Maureen B. Cavanaugh, *On the Road to Incoherence: Congress, Economics, and Taxes*, 49 UCLA L. REV. 685, 687-90 (2002) (discussing tax-free employee benefits); Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 VILL. L. REV. 871, 874-76 (1993) (discussing the low-income housing credit and the extent to which its structure creates a conflict between tax policy goals and housing policy goals); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 997-1026 (2004) (discussing food stamps and the earned income tax credit and arguing that the use of tax law to implement and administer these two programs is justified).

¹¹⁴ See, e.g., SURREY, *PATHWAYS TO TAX REFORM*, *supra* note 111, at 134-36 (examining who is actually economically benefited by tax provisions and noting that tax deductions provide an upside-down subsidy, giving a greater financial benefit to higher-income taxpayers than to lower-income ones); SURREY & MCDANIEL, *supra* note 111, at 71-82 (developing the upside-down subsidy argument even further); Cavanaugh, *supra* note 113, at 687-88, 715-21 (arguing that taxes may be the optimal means to control externalities); Edward Yorio, *The President's Tax Proposals: A Major Step in the Right Direction*, 53 FORDHAM L. REV. 1255, 1257-63 (1985) (focusing on equity and efficiency concerns); Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973, 978-95 (1986) (evaluating tax incentives based on their efficiency). This literature does, however, occasionally mention non-economic factors, as detailed *infra* Part II.B.

¹¹⁵ It is assumed for the purposes of this Article that the genesis of a regulatory structure is in a legislative body as opposed to an administrative agency or the courts, although both of the latter bodies play critical roles in the interpretation and enforcement of legislatively enacted rules.

fragmented way.¹¹⁶ This new framework pulls these disparate threads together and introduces some additional relevant considerations.

1. Legislative Processes

The legislative process for creating particular sets of laws can vary with respect to the substantive *expertise* of the legislators or committees who are in the best position to influence the form of new laws, the extent of *coordination* between those laws and other laws affecting the same activities or persons, the degree to which partisan constituencies can *capture* the process, and the *visibility* of the process to the public. A legislative process that takes full advantage of developed expertise, facilitates coordination of new rules with existing rules in the same area, limits or avoids capture by partisan constituencies, and is highly visible to all interested parties – including the media and the public – would be more desirable. And since control over legislative drafting and approval tends to rest primarily with the relevant congressional committees, it is appropriate to focus primarily on the committee phase of the process.¹¹⁷

Expertise. It is often the case that congressional tax-writing committees and their staff collectively lack expertise in non-tax matters, although individual members will have expertise in various non-tax areas. The result of this lack of expertise is that such committees may be less able to design effective (tax) laws to further non-tax policy goals when compared with their counterparts on other committees that focus on such goals.¹¹⁸ For example, the House Committee on Agriculture generally would have more expertise with respect to farming issues than the House Ways and Means Committee.¹¹⁹

Coordination. If responsibility for laws affecting the same activities or persons is split between the tax-writing committees and other congressional committees, this split may result in tax laws that counter – instead of reinforce – the laws passed by those other committees. For example, Professor Thuronyi

¹¹⁶ See *supra* notes 113-14 and accompanying text.

¹¹⁷ See, e.g., Randall S. Kroszner & Thomas Stratmann, *Corporate Campaign Contributions, Repeat Giving, and the Rewards to Legislator Reputation*, 48 J.L. & ECON. 41, 43-45 (2005) (observing that the congressional committee system provides a mechanism for legislators to build credible reputations in specific policy areas, reputations that the authors find are rewarded by repeat PAC contributions); Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1187 & n.65 (1993) (stating that the consensus among scholars studying Congress is that domination of the relevant committee leads to an outcome more favorable to the controlling interest group).

¹¹⁸ SURREY & MCDANIEL, *supra* note 111, at 106-07; Edward Yorio, *Equity, Efficiency, and the Tax Reform Act of 1986*, 55 FORDHAM L. REV. 395, 425 (1987). This expertise may also, however, facilitate capture. See Zelinsky, *supra* note 117, at 1184-87 (criticizing the focus on the expertise of congressional committees as ignoring the agency problem created by limited constituencies capturing such committees).

¹¹⁹ See Zelinsky, *supra* note 117, at 1185.

observed that the tax law encouraged dairy farmers to increase their production while at the same time agricultural subsidies encouraged them to decrease their production.¹²⁰ He therefore argued that if instead the same congressional committee reviewed all subsidies in a particular substantive area, more consistent and efficient subsidies would result.¹²¹

At the same time, if the laws affecting certain activities or persons relate to tax laws or policies, then coordination with the tax laws through the tax-writing committees may be more desirable even if the new laws under consideration also advance non-tax goals.¹²² For example, pension plans are required to meet a complex set of requirements to be tax-exempt.¹²³ If Congress wants to enact other laws to encourage participation in private pension plans, a non-tax goal, a failure to coordinate those laws with the existing tax requirements could easily result in inconsistent requirements and incentives.

Capture. Congressional committees that focus on a particular policy area (e.g., agriculture) may be prone to capture by the limited constituencies most affected by government policy in that area (e.g., farmers).¹²⁴ Professor Zelinsky has therefore asserted that the legislative process is more likely to generate laws free from interest group capture, and with greater legitimacy under pluralist criteria, if that process subjects the laws to the scrutiny and influence of more diverse constituencies.¹²⁵ He therefore contrasts the tax-writing committees, which tend to attract attention and campaign contributions from a large number and variety of sources, with committees focused on other specific subject areas that tend only to attract attention and campaign contributions from a much smaller set of interested constituencies.¹²⁶

Visibility. The actions of congressional committees that focus on a particular policy area may generally be more visible to the public than the

¹²⁰ Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155, 1161.

¹²¹ *Id.* But see Weisbach & Nussim, *supra* note 113, at 994 (criticizing Thuronyi's example as applied to the agency level because the tax subsidies for farmers are part of a larger pro-business investment tax regime that the IRS may be the best agency to coordinate, even though the Department of Agriculture may be the best agency to regulate farmers specifically).

¹²² See Thuronyi, *supra* note 120, at 1192-93 (arguing that transferring jurisdiction over a tax provision that serves both tax and non-tax goals to a non-tax agency could complicate tax policy decisions).

¹²³ See generally 26 U.S.C. §§ 401-420 (2000).

¹²⁴ See generally Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 LAW & SOC. INQUIRY 959 (1997) (book review) (describing the recent history of academic thought regarding capture by interest groups).

¹²⁵ Zelinsky, *supra* note 117, at 1166.

¹²⁶ See *id.* at 1177-84. For an attempt to model this difference between tax-writing committees and other committees, see generally Dhammika Dharmapala, *Comparing Tax Expenditures and Direct Subsidies: The Role of Legislative Committee Structure*, 72 J. PUB. ECON. 421 (1999).

actions of tax-writing committees, which approve tax law provisions that also touch on numerous non-tax areas.¹²⁷ At the same time, however, because at least significant tax bills generate public discussion, there may be less ability to hide the provisions of such bills from scrutiny not only by directly affected parties but also by the media and the public generally.¹²⁸ Thus, to the extent that non-tax committees only receive the attention of limited constituencies, they may receive less visibility and accountability for their decisions than the tax committees. If the latter effect dominates, the public and interest groups may hold tax-writing committees more accountable because the provisions they enact are reviewed and publicized by more constituencies.¹²⁹

Another consideration is that the activities of tax-writing committees may be less visible because of framing effects – the phenomenon whereby a budget item framed as a tax expenditure will be viewed more favorably than an economically identical budget item that is framed as a direct expenditure – and thus less subject to critical scrutiny. The tax expenditure concept is in large part an attempt to eliminate these framing effects, but there are reasons to believe that more than thirty years after the institutionalization of that concept, these effects still exist.¹³⁰

2. Administrative Agencies

Government agencies also differ from each other in ways similar to those found in the legislative process. Agencies have different areas of substantive *expertise*, usually have strong intra-agency *coordination* but weak inter-agency coordination, may be *captured* by limited constituencies, and vary in their *accountability* to the public. As with the legislative process, expertise and

¹²⁷ See SURREY & MCDANIEL, *supra* note 111, at 104-05; Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244, 244-45 (1969).

¹²⁸ See Weisbach & Nussim, *supra* note 113, at 969-70 (rejecting the visibility argument because of the increased public discussion of tax breaks and the potential for hidden subsidies in other, non-tax areas of law).

¹²⁹ See Zelinsky, *supra* note 117, at 1184 (observing that it appears the general media covers the tax-related institutions of government to a greater extent than more narrowly focused government institutions).

¹³⁰ See Edward A. Zelinsky, *Do Tax Expenditures Create Framing Effects? Volunteer Firefighters, Property Tax Exemptions, and the Paradox of Tax Expenditure Analysis*, 24 VA. TAX. REV. 797, 823-24 (2005) (arguing that some – or even many – public policies that are unacceptable when framed as direct government expenditures become desirable when framed as tax subsidies, even though the policies are substantively and economically equivalent). *But see* Weisbach & Nussim, *supra* note 113, at 970-71 (rejecting this framing argument both because framing effects can be overcome by greater publicity for tax expenditures and because if it is valid, the members of the public who are subject to framing effects will also be likely to miss the often subtle effects of non-tax programs). For a more general consideration of common cognitive errors when considering tax-related issues, see Edward J. McCaffery & Jonathan Baron, *Thinking About Tax*, 12 PSYCHOL. PUB. POL'Y & L. 106, 112-27 (2006).

coordination are generally desirable, while capture is not. Accountability to both Congress and the public is also generally desirable.

Expertise. Government agencies naturally develop expertise in their substantive areas of activity. Such expertise can lead to quicker and more accurate interpretation and enforcement of the laws which the agency administers.¹³¹ Lack of expertise may leave an agency less capable of effectively administering laws when compared to an agency with the appropriate expertise.¹³²

Coordination. In general, a single government agency is better at coordinating activities within the agency (i.e., has lower costs of coordination) than it is at coordinating activities with other agencies.¹³³ This phenomenon has led Professors Weisbach and Nussim to conclude that in the context of government transfer programs, integration with the tax laws will be most successful when the coordination benefits between the tax system and the non-tax program are high and the specialization benefits of a separate program are low.¹³⁴ In some cases, Congress has created joint authority over certain areas in an attempt to overcome the usually high costs of inter-agency coordination. The few studies of these attempts indicate, however, that they have had mixed results at best.¹³⁵

¹³¹ See Weisbach & Nussim, *supra* note 113, at 985-86 (observing that specialization generally allows an individual or organization to perform the same activity more rapidly, more accurately, or better in some other dimension).

¹³² See Yorio, *supra* note 118, at 425 (observing that the IRS generally has no expertise in areas outside of tax and thus is less likely to effectively administer tax laws designed to further non-tax policy goals).

¹³³ See Weisbach & Nussim, *supra* note 113, at 985 (pointing out that splitting a function into a separate division promotes coordination within that division but increases coordination costs between that division and other activities of the same organization).

¹³⁴ *Id.* at 996; see also SURREY & MCDANIEL, *supra* note 111, at 106 (recognizing the confusion that can be created when both the Treasury Department and another executive agency have responsibility over the same area).

¹³⁵ See, e.g., George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 323-40 (1987) (describing the problems in the split enforcement of the Occupational Safety and Health Act); Alan Larsen, Comment, *National Game Ranges: The Orphans of the National Wildlife Refuge System*, 6 ENVTL. L. 515, 525-29 (1975) (describing the conflicts created by dual management of game ranges, which are federal lands that are available for the grazing of domestic livestock); Joseph A. Lumsdaine, *Ocean Dumping Regulation: An Overview*, 5 ECOLOGY L.Q. 753, 792 (1976) (criticizing the results of joint administration of the Marine Protection, Research, and Sanctuaries Act); Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 57-63 (1989) (pointing out the problems in the split enforcement of the Occupational Safety and Health Act and recommending elimination of the split); James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department over Telecommunications Transactions*, 6 COMMLAW CONCEPTS 195, 205-06 (1998) (observing problems with the split enforcement of antitrust standards for

Capture. Constituencies with particular interest in a certain substantive area may be able to capture an agency that specializes in that area. Capture may occur because those constituencies have strong influence with the congressional committees overseeing the agency, because those constituencies provide “revolving door” job opportunities to employees leaving the agency, or simply because those constituencies are the only ones willing to invest the time and resources to engage the agency when it is interpreting or enforcing the laws at issue. The degree to which the agency and its employees are subject to political pressures from Congress or from political appointees within the executive branch may enhance or inhibit the degree of capture.

Accountability. An agency with sole responsibility for a particular substantive area may be more accountable to both Congress and the public with respect to activities in that area as compared to an agency that has responsibility for several areas.¹³⁶ The degree to which the agency’s activities are visible to the public, whether because of congressional or media attention, may also affect its accountability.

3. Effectiveness

Comparisons of the legislative process and the administering agency to determine which legal vehicles are best suited to create and implement a particular regulatory program are only part of the story. The story would not be complete without comparing how effective each agency is likely to be in implementing the law and thereby achieving the desired policy goal. The relevant considerations include the *effectiveness of enforcement* by the applicable agency, the *compliance burden* on the regulated community, and the degree to which choice of legal vehicle creates opportunities for *administrative arbitrage*.

Enforcement Effectiveness. The effectiveness of enforcement may vary depending on what legal vehicle is chosen. If the agency charged with enforcing the laws already has established enforcement procedures and resources that are well-tailored to the new regulatory scheme, then enforcement may be relatively effective. However, if the agency instead has enforcement procedures that are ill-adapted to the new laws, the effectiveness of enforcement may be minimal, unless the agency can easily adopt new procedures. For example, using tax law allows enforcement through the

telecommunications transactions). *But see* Richard H. Fallon, Jr., *Enforcing Aviation Safety Regulations: The Case for a Split-Enforcement Model of Agency Adjudication*, 4 ADMIN. L. REV. 389, 417-22 (1991) (arguing for enforcement of federal aviation safety rules to be moved from the Federal Aviation Administration, a part of the Department of Transportation, to the independent National Transportation Safety Board); Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 268-69 (citing advantages to split administration of laws when one of the parties involved is an independent agency, including an increased perception of fairness).

¹³⁶ For a detailed discussion of principal-agent problems that may arise between Congress and an agency, see Weisbach, *supra* note 110, at 13-15.

existing tax collection infrastructure.¹³⁷ Whether that enhances enforcement will depend on whether the aspects of that infrastructure – e.g., an experienced national field staff, established legal support, the “intimidation” effect of the IRS, low audit coverage, a focus on tracking dollar amounts, and significant delay between activities and audit – fit well with the regulation at issue. Agencies may also differ with respect to their litigation options if administrative enforcement proceedings fail. At the same time, splitting responsibility for an area between two or more agencies may lead to more effective enforcement as one agency avoids the mistakes of the other or as they compete for limited resources.¹³⁸

Compliance Burden. The cost, and therefore the extent, of compliance may vary depending on what legal vehicle is chosen. For example, if the laws governing a particular set of activities are scattered among two or more substantive bodies of law, thereby requiring the regulated community to master – or hire experts in – both bodies of law, the cost of compliance may be significantly higher than if those laws were located in a single body of law. Similarly, if administration of those laws is split between two different agencies with different procedures, the cost of compliance may be higher.

Arbitrage Opportunities. If the laws governing the same set of activities or persons are split between two or more substantive areas of law, and therefore two or more government agencies, opportunities for administrative arbitrage may arise. This result may arise from coordination failures at either the legislative or agency level. For example, the rise of 527s reflects such a failure. Congress’ apparent assumption that 527s would be subject to federal or state election law disclosure requirements was incorrect because of the differing definitions of “political activity” for election law and tax law purposes, which permitted the creation of organizations that escaped the disclosure requirements of both bodies of law.¹³⁹

III. MAKING THE CHOICE

Part I of this Article detailed the different ways that election law and tax law regulate political activities and the current and proposed melding of those two bodies of law by Congress in response to the rise of 527s. Part II developed a framework for judging whether one body of law should be preferred over another when instituting or expanding a regulatory program, including whether such a program would be best shared between the two bodies of law. This Part takes this framework and applies it to emerging ideas regarding the regulation of 527s through a mix of election law and tax law provisions.

¹³⁷ See Weisbach & Nussim, *supra* note 113, at 980.

¹³⁸ See Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1222-39 (2006) (arguing that redundancy and overlap in policy matters by agencies can be advantageous and desirable in many circumstances).

¹³⁹ See *supra* notes 96-100 and accompanying text.

A. Legislative Processes

A comparison of the legislative processes associated with both bodies of law – more specifically the typical process associated with changes to election law, as opposed to the typical process associated with changes to tax law provisions related to political activity – reveals a striking contrast. While in general tax law might be considered to have a more visible process, in this particular context the historical evidence is to the contrary. At the same time, considerations of both expertise and coordination tend to favor incorporating the additional regulation of political activity wholly within election law. Finally, the capture concern has a unique aspect in this context because of the group that arguably has the greatest personal interests at stake with such regulation – incumbent politicians.

1. Election Law

The 2002 changes to election law were the result of a lengthy, convoluted, and high-profile legislative process. While it is difficult to establish a firm start date for that process, it began no later than the introduction of the first major reform bill in 1997.¹⁴⁰ In large part, detailed House and Senate committee investigations into the 1996 federal elections motivated that legislation.¹⁴¹ The next five years produced extensive legislative maneuvering and debate, as the supporters of the legislation forced floor consideration of successive versions of the bill even when faced with unsupportive congressional committees.¹⁴² This bruising debate yielded significant, but arguably limited, changes to election law.¹⁴³ For example, the electioneering communications provisions initially covered a much broader range of communications, but the provisions' supporters had to narrow the definition of

¹⁴⁰ Bipartisan Campaign Integrity Act of 1997, H.R. 2183, 105th Cong. (1997); *see also* *McConnell v. FEC*, 251 F. Supp. 2d 176, 202 (D.D.C. 2003) (detailing the legislative origins of BCRA, originally introduced as the Bipartisan Campaign Integrity Act).

¹⁴¹ *See generally* COMM. ON GOVERNMENTAL AFFAIRS, INVESTIGATION OF ILLEGAL OR IMPROPER ACTIVITIES IN CONNECTION WITH 1996 FEDERAL ELECTION CAMPAIGNS, S. REP. NO. 105-167 (1998) (spanning six volumes); *Campaign Finance Improprieties and Possible Violations of Law: Hearing Before the H. Comm. on Gov't Reform & Oversight*, 105th Cong. 14-20 (1997) (statement of Rep. Dan Burton, Chairman, H. Comm. on Gov't Reform & Oversight).

¹⁴² *See McConnell*, 251 F. Supp. 2d at 202-05 (summarizing this maneuvering, including the unfavorable report of the Committee on House Administration and the failure of the Senate Committee on Rules and Administration to act on the 1999 version of the bill).

¹⁴³ *See* Thomas E. Mann, *Linking Knowledge and Action: Political Science and Campaign Finance Reform*, 1 PERSP. ON POL. 69, 79-80 (2003) (concluding that "the new law is a relatively modest, incremental undertaking"). *But see* BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM, at xiv (4th prtg. 2003) (concluding that BCRA is "far reaching legislation" that "federalizes much state and local activity" and "sharply curtails the rights of citizens to publicly criticize . . . officeholders and candidates").

"electioneering communications" before Congress would agree to enact those provisions.¹⁴⁴

The legislative history of other election law provisions reveals a similar level of debate and attention. The initial ban on corporate campaign contributions and the initial federal disclosure rules were considered important enough to justify mention in President Theodore Roosevelt's State of the Union addresses,¹⁴⁵ as well as numerous congressional hearings and complicated political maneuvering.¹⁴⁶ And the legislative debates for both the 1971 enactment of FECA and its 1974 amendment were also extensive.¹⁴⁷

¹⁴⁴ Compare H.R. 2183 § 201(b) (including, within an expanded definition of express advocacy, both any radio or television paid advertisement transmitted within sixty days of an election in the relevant state *and* any communication "expressing unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited reference to external events, such as proximity to an election"), with 2 U.S.C. § 434(f)(3)(A)(i) (2000 & Supp. IV 2004) (limiting electioneering communications to broadcast, cable, or satellite communications that reach the relevant electorate and refer to a clearly identified candidate within thirty days of a primary election, nominating convention, or caucus and within sixty days of a general election).

¹⁴⁵ See President Theodore Roosevelt, Seventh Annual Message (Dec. 3, 1907), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29548> (supporting the disclosure of campaign contributions and expenditures); President Theodore Roosevelt, Sixth Annual Message (Dec. 3, 1906), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29547> (urging support for a ban on corporate campaign contributions); President Theodore Roosevelt, Fifth Annual Message (Dec. 5, 1905), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29546> (supporting a proposed ban on corporate campaign contributions). Other campaign finance proposals have also made their way into the State of the Union addresses of later Presidents. See, e.g., President William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 112, 118 (Jan. 27, 1998) (urging the adoption of campaign finance reform legislation); President William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 109, 110 (Feb. 4, 1997) (supporting campaign finance reform); President William J. Clinton, Address Before a Joint Session of Congress on Administration Goals, 1 PUB. PAPERS 113, 118 (Feb. 17, 1993) (supporting campaign finance legislation); President Lyndon B. Johnson, Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 3, 7 (Jan. 12, 1966) (proposing the revision and loosening of election law provisions).

¹⁴⁶ See Mutch, *supra* note 18, at 6-16. One significant piece of election law legislation, the Federal Corrupt Practices Act of 1925, apparently had a very limited legislative history, but it represented essentially a re-codification of existing campaign finance law that had been extensively debated and reviewed earlier, with the only major change being that it no longer reached primary elections as required by the Supreme Court's decision in *United States v. Newberry*, 256 U.S. 232 (1921). See Mutch, *supra* note 18, at 16-21 (describing the Court's decision in *Newberry* and the legislative reaction to it).

¹⁴⁷ See *Legislative History of P.L. 93-443*, 74 CIS PL 93443, 93 CIS Legis. Hist. P.L. 443 (LexisNexis) (Oct. 15, 1974) (listing the six House and Senate reports and five hearings that related to the 1974 amendments to FECA); *Legislative History of P.L. 92-225*, 72 CIS

Both FECA, as amended in 1974, and the 2002 election law changes also survived numerous legal challenges.¹⁴⁸

2. Tax Law

The tax law provisions relating to political activity have historically had much briefer and less exciting legislative histories. As noted previously, there is essentially no administrative or legislative history for the general rule that expenditures for political activities are not deductible, although both the House and Senate tax-writing committees ultimately considered and approved that provision.¹⁴⁹ The statutory prohibition on political activity for charities has a similar lack of legislative history because then-Senator Lyndon Johnson introduced it as an amendment to an almost-final tax bill, allowing it to completely avoid any committee consideration.¹⁵⁰ The tax-writing committees and Congress as a whole apparently did not see the enactment of § 527 as a significant event either. Section 527's legislative history covers only a handful of pages and is intermixed with discussions of the tax provisions relating to upholstery and needles with which it was packaged.¹⁵¹

PL 92225, 92 CIS Legis. Hist. P.L. 225 (LexisNexis) (Feb. 7, 1972) (listing the ten House and Senate reports and six hearings that related to the 1971 enactment of FECA).

¹⁴⁸ See *McConnell v. FEC*, 540 U.S. 93, 93 n.* (2003) (listing the appellants in the case challenging the 2002 changes, including members of Congress, major political parties, and various advocacy, labor, and business associations); *McConnell v. FEC*, 251 F. Supp. 2d 176, 183, 208 (D.D.C. 2003) (observing that the case involved eleven consolidated actions, and that after some initial dismissals, the case still involved seventy-seven plaintiffs and seventeen defendants); *MUTCH*, *supra* note 18, at 49-51 (detailing the breadth of *Buckley*'s legal assault on FECA, as amended, and describing the credentials of those involved). Recognizing the importance and complexity of these cases, the Supreme Court in each instance extended the total time for oral argument from one to four hours. Compare *McConnell*, 539 U.S. at 912 (allocating four hours for oral argument), and *Buckley v. Valeo*, 423 U.S. 820, 820 (1975) (same), with *SUP. CT. R. 28* (allowing thirty minutes per side of oral argument absent a request for additional time and stating that "[a]dditional time is rarely accorded").

¹⁴⁹ See *supra* note 62 and accompanying text.

¹⁵⁰ See *Houck*, *supra* note 59, at 23-29 (explaining Senator Johnson's political motivations behind introducing the 1954 amendment to § 501(c)(3)); *Kindell & Reilly*, *supra* note 90, at 448-51 (discussing speculation as to why Senator Johnson introduced the amendment and concluding that it is impossible to be sure of his actual motivation); *O'Daniel*, *supra* note 59, at 740-41, 752-67 (reviewing the incomplete historical record of the reasons for Senator Johnson's introduction of an amendment that added the prohibition on political campaign activities to § 501(c)(3), apparently in reaction to opposition by § 501(c)(3) organizations during his 1954 primary campaign).

¹⁵¹ See H.R. REP. NO. 93-1642, at 22-23 (1974) (Conf. Rep.); S. REP. NO. 93-1357, at 25-36 (1974); H.R. REP. NO. 93-1502, at 103-13 (1974); William P. Streng, *The Federal Tax Treatment of Political Contributions and Political Organizations*, 29 TAX LAW. 139, 140 (1975) (observing that § 527 was an uncontroversial addition to a "Christmas tree" tax bill).

The 527 disclosure provisions also have a relatively short legislative history, even though Congress enacted them during the same five-year period in which it debated, at length, what ultimately became BCRA. The first bill to include the disclosure provisions was introduced in April 2000, partly in reaction to the role of "stealth" 527s during the presidential primary election that year.¹⁵² At first, those provisions appeared doomed to die in committee, but their supporters managed to force their consideration, threatening to sink the Defense Department's reauthorization bill by adding the disclosure provisions to that legislation.¹⁵³ Within three months of their initial introduction, the provisions became law after only a brief tax-writing committee report on a related bill and a single hearing by the House Subcommittee on Oversight.¹⁵⁴

Perhaps not coincidentally, legal challenges to these rules have also been much less involved affairs. The courts have generally upheld these rules in the face of constitutional challenges based on the conclusion that these tax provisions only affect the cost of participating in political activities, but do not prohibit such participation.¹⁵⁵ The 527 disclosure provisions survived a

¹⁵² See Underground Campaign Disclosure Act of 2000, H.R. 4168, 106th Cong. (2000).

¹⁵³ See 146 CONG. REC. S4607, 4656-58 (daily ed. June 7, 2000) (statement of Sen. McCain) (offering 527 disclosure provisions as an amendment to the National Defense Authorization Act for Fiscal Year 2001, S. 2549, 106th Cong. (2000)). The amendment almost certainly would have been fatal to the bill because the Constitution requires that revenue-generating provisions originate in the House. U.S. CONST. art. I, § 7. The Senate's addition of a tax provision to the reauthorization bill would have exposed that bill to being "blue-slipped" as a revenue bill that failed to meet this constitutional requirement. See 146 CONG. REC. S4721, 4785 (daily ed. June 8, 2000) (statement of Sen. Sessions) (calling attention to the risk that this amendment posed to the bill).

¹⁵⁴ See Act of July 1, 2000, Pub. L. No. 106-230, 114 Stat. 477; H.R. REP. NO. 106-702, at 22 (2000); *Disclosure of Political Activities of Tax-Exempt Organizations: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 106th Cong. 4 (2000) (statement of Rep. Houghton, Chairman, H. Comm. on Ways & Means).

¹⁵⁵ See *Branch Ministries v. Rossotti*, 211 F.3d 137, 143-44 (D.C. Cir. 2000) (rejecting a constitutional challenge to § 501(c)(3)'s prohibition of political activity for charities); see also *Cammarano v. United States*, 358 U.S. 498, 512-13 (1959) (rejecting a constitutional challenge to the Treasury Department's denial of a deduction for lobbying expenditures on the ground that, like everyone else, the challenging taxpayers were "simply being required to pay for those activities entirely out of their own pockets"). See generally Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611, 638-44 (2003) (discussing the subsidy/penalty rationale that protects tax provisions, including those related to political activity, from successful constitutional challenge on free speech or association grounds). The court in *Branch Ministries* relied primarily on two Supreme Court cases that together establish the principle that Congress may place general restrictions on speech as a condition for receiving a tax benefit as long as the affected organizations can easily form related entities that are not subject to the restriction (and that do not receive the related tax benefit). See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 551-54 (1983) (Blackmun, J., concurring) (discussing the constitutionality of the lobbying limitations on § 501(c)(3) organizations); see also *FCC v. League of Women*

challenge on essentially the same grounds, with the Court of Appeals for the Eleventh Circuit concluding that to avoid these requirements, an organization only had to forgo claiming tax-exempt status under § 527.¹⁵⁶ Some 527 organizations may also have intentionally chosen not to identify contributors who prefer to remain anonymous, viewing that choice as an election they make at the cost of the additional tax owed.¹⁵⁷

3. Comparing the Processes

In light of the expertise, coordination, capture, and visibility factors identified earlier, a comparison of these processes reveals reasons to favor incorporating restrictions and disclosure requirements into election law as opposed to tax law. Expertise and capture probably do not favor either body of law over the other for a simple reason: regardless of which specific congressional committees are involved in the legislative processes, incumbent politicians consider both bodies of law. As experienced politicians, they are eminently familiar with the corruption and appearance of corruption concerns raised by political activity expenditures, as the Supreme Court repeatedly acknowledged in its decision upholding almost all of the 2002 changes to election law.¹⁵⁸ In addition, there is no obvious reason to believe that the members of tax-writing committees would have any greater expertise than other members of Congress in balancing these concerns against the freedom of speech and association concerns that are implicated when regulating such expenditures.¹⁵⁹ At the same time, these incumbents, regardless of the

Voters of Cal., 468 U.S. 364, 399-400 (1984) (adopting Justice Blackmun's reasoning in a case involving a prohibition on editorializing by a public broadcasting station that received Corporation for Public Broadcasting funds).

¹⁵⁶ See *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1361-62 (11th Cir. 2003). The IRS apparently believes that 527 status, or at least § 527 taxes, are mandatory, not elective. See I.R.S. Field Serv. Advisory Mem. 2000-37-040 (Sept. 15, 2000) ("Section 527 is not an elective provision."); *Edited Transcript of the January 30, 2004 ABA Tax Section EO Committee Meeting*, 44 EXEMPT ORG. TAX REV. 23, 29 (2004) (stating the position of senior IRS officials that, in the wake of the Eleventh Circuit's ruling, the decision whether an organization chooses to file notice as a 527 is voluntary, but that being a political organization is not, and therefore a political organization is subject to the taxes provided by § 527 if it chooses not to file such notice or files such notice but fails to file the required disclosure reports). But at least one commentator believes that such status is in fact elective. See Colinvaux, *supra* note 12, at 540-44.

¹⁵⁷ The government appears to permit such an election, as it conceded that this was an option for 527s when it defended the disclosure provisions against a constitutional challenge. See Brief of United States of America in Support of Its Motion To Dismiss at 5 & n.4, *Nat'l Fed'n of Republican Assemblies v. United States*, 148 F. Supp. 2d 1273 (S.D. Ala. 2001) (No. 00-759-RV-C).

¹⁵⁸ See *McConnell v. FEC*, 540 U.S. 93, 137, 158 (2003).

¹⁵⁹ If anything, the opposite may be true. See *infra* note 170. Whether members of Congress generally have any particular expertise in conducting such balancing is a matter of

committees on which they serve, are all part of the interest group that arguably presents the greatest danger of capturing the legislative process to pursue its own interests above the public interest.¹⁶⁰

Visibility and coordination present more complicated issues. With respect to the former, it has been argued that as a general matter, tax laws are subject to greater visibility than laws in other substantive areas because the media and a larger number and range of interest groups pay attention to the activities of the tax-writing committees.¹⁶¹ But in the specific context of political activity, the opposite appears to be the case. Tax law provisions relating to political activity receive scant attention, while election law provisions are the subject of extensive debate and coverage.¹⁶² The reason for the lack of attention to tax provisions related to political activity may rest on a simple fact: they do not involve much money.¹⁶³ As such, they are probably of little interest to the interest groups and the media that normally cover the tax-writing committees. In contrast, election law provisions have been some of the highest-profile pieces of legislation Congress has ever considered, and thus the public has subjected them to a high level of scrutiny.

As for coordination, recall that tax law, until the enactment of the 527 disclosure provisions, focused on ensuring the use of after-tax dollars for political activity – i.e., the cost of engaging in such activity.¹⁶⁴ Election law, in contrast, focused on the disclosure of political activity and on the imposition of restrictions on such activity.¹⁶⁵ This division of responsibility suggests that the tax-writing committees could better coordinate new laws seeking to decrease or increase the cost of such activity, while congressional committees that have jurisdiction over election law could better coordinate new laws seeking to

some debate. *See McConnell*, 540 U.S. at 339 (Kennedy, J., concurring in judgment in part and dissenting in part) (arguing that Congress demonstrated a “fundamental misunderstanding of the First Amendment” by enacting vague, overbroad electioneering communications provisions).

¹⁶⁰ *See McConnell*, 540 U.S. at 262-63 (Scalia, J., concurring in part and dissenting in part) (criticizing BCRA for protecting incumbent politicians from criticism, although stopping short of asserting that the members of Congress were necessarily acting consciously in their own self-interest).

¹⁶¹ *See supra* notes 127-29 and accompanying text.

¹⁶² *Compare supra* Part III.A.1 with *supra* Part III.A.2.

¹⁶³ The 527 disclosure provisions presumably had negligible revenue effect. Congress enacted the other tax provisions before the Joint Committee on Taxation provided such revenue effect estimates, but given that the total amount spent during 2004 on political activities was somewhere in the single-digit billions of dollars, *see supra* note 105, *infra* note 176 and accompanying text, as compared to the double-digit trillions of dollars of taxable income reported to the IRS in 2005 (the latest year for which figures are available), *see infra* note 195 and accompanying text, it is unlikely those other provisions have significant revenue effects.

¹⁶⁴ *See supra* Part I.B.1.

¹⁶⁵ *See supra* Part I.A.

disclose or restrict such activity.¹⁶⁶ This conclusion is reinforced by the general bias of the tax laws against disclosure in the interests of encouraging compliance with the tax laws.¹⁶⁷

This division of responsibility may also explain the stark differences in the legislative processes for these two sets of political activity provisions. The potential harm from disclosure requirements and, even more so, from funding restrictions rises to a constitutional level, and thus attracts both greater legislative scrutiny and more robust legal challenges. The potential harm from the tax provisions, at least until the introduction of the 527 disclosure rules, is limited to an increased cost of engaging in political activity. While potentially critical to candidates and others seeking to be involved in political activity, such an increased cost generally does not raise constitutional concerns, as the courts have repeatedly found.¹⁶⁸ It is unclear, however, whether the relevant tax provisions would immediately have a level of visibility equal to the level faced by election law provisions even if tax law became involved in imposing disclosure requirements, as it has with 527s, or funding restrictions, as has been proposed by including most 527s in an expanded definition of political committee based primarily on their tax classification. The history of the 527 disclosure rules indicates that at least initially this would not be the case.

The fact that visibility and coordination appear to favor incorporating restrictions and disclosure requirements into election law as opposed to tax law is not necessarily conclusive, however. Tax law's visibility could be improved, and its coordination might be adequate if even a few members of the tax-writing committees had expertise in election law matters.¹⁶⁹ It might also be argued that the relative ease with which Congress passed the 527 disclosure provisions suggests that the tax law route presents less opportunities for capture, perhaps because the members of tax-writing committees are less consciously self-interested in this area than the members of the committees that

¹⁶⁶ This pre-existing division arguably biases the result when considering coordination – why could we not consider a wholesale reallocation of responsibilities between election law and tax law? The answer is that the allocation of cost/subsidy rules to tax law is driven in large part by the fundamental role of that body of law – to determine what is, and what is not, subject to tax.

¹⁶⁷ See James N. Benedict & Leslie A. Lupert, *Federal Income Tax Returns – The Tension Between Government Access and Confidentiality*, 64 CORNELL L. REV. 940, 943-52 (1979) (describing the reasons underlying the confidentiality of tax information and the current restrictions on disclosures within the government).

¹⁶⁸ See *supra* note 155 and accompanying text. See generally Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313 (2007) (defending the constitutionality of the current ban on political activity by § 501(c)(3) organizations).

¹⁶⁹ See Zelinsky, *supra* note 117, at 1185 (arguing that tax-committee members are capable of developing expertise in other subjects comparable to their non-tax counterparts, which would eliminate the latter's comparative advantage).

consider election law provisions.¹⁷⁰ It is therefore necessary to also consider the relevant administrative agencies and the ultimate effectiveness of each body of law.

B. *Administrative Agencies*

Comparing the FEC and the IRS is a study in contrasts. The FEC is focused solely on political activities, is relatively small, and is closely controlled by six political appointees. The IRS is responsible for collecting the tax revenues for the entire federal government, has a budget and staff that reflects the magnitude of that responsibility, and is controlled by a single political appointee who both out of necessity and practice has little or no involvement in specific taxpayer matters. These differences lead to the FEC having a distinct advantage over the IRS with respect to its expertise in regulating political activities, its ability to coordinate such regulation with existing laws limiting or requiring disclosure of political activities, and its accountability for implementing such regulation. At the same time, its small size and the statutorily granted degree of control the politically appointed FEC Commissioners exercise appear to have given incumbent politicians – a substantial part of the regulated community – undue influence over the FEC's activities, a weakness the IRS does not share.

1. The Federal Election Commission

The FEC, an independent agency that reports directly to Congress, is responsible for administering and enforcing federal election law.¹⁷¹ The Commission consists of six Commissioners nominated by the President and confirmed by the Senate for six-year terms, no more than three of whom may be members of the same political party.¹⁷² All Commission actions require four affirmative votes.¹⁷³ Historically, the Commission has consisted of three Democratic and three Republican members chosen through negotiations between the relevant party's congressional leadership and the President.¹⁷⁴

¹⁷⁰ It could also be argued, however, that there is a difference in expertise across members of Congress, particularly with respect to sensitivity to the constitutional issues of free speech and free association, and that the members of the tax-writing committees are less likely to have experience with such issues because tax proposals rarely implicate constitutional concerns.

¹⁷¹ See 2 U.S.C. § 437c(b)(1) (2000).

¹⁷² *Id.* § 437c(a)(1)-(2).

¹⁷³ *Id.* § 437c(c).

¹⁷⁴ See MUTCH, *supra* note 18, at 104-06 (detailing the power struggles between the President and Congress over several appointments); see also BROOKS JACKSON, *BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED* 10 (1990) (describing how the commissioners, at least through 1990 when the book was published, were "political cronies of party leaders" and employees of parties and PACs as opposed to prominent academics, distinguished former judges, or national leaders from nonpartisan groups).

The Commission is currently supported by a staff of slightly less than 400 full-time employees and a total budget of slightly more than \$54 million, allocated over all functions, including administration, audit (approximately 10% of staff), information technology, general counsel (approximately 35% of staff), and reports analysis (approximately 15% of staff).¹⁷⁵ During the last presidential election year, approximately 10,000 candidate committees, political party committees, PACs, and other organizations (e.g., organizations other than political committees that made independent expenditures and/or electioneering communications) filed reports with the FEC and reported slightly more than \$8 billion in receipts and approximately \$8.5 billion in expenditures.¹⁷⁶

The FEC is responsible for providing guidance in the form of regulations, advisory opinions, and public education material.¹⁷⁷ Regulations are subject to the requirements imposed by the Administrative Procedure Act, including issuance in proposed form, opportunity for public comment, then issuance in final form.¹⁷⁸ Advisory opinions only apply to the party requesting them and to persons in situations that are materially indistinguishable from that which is the subject of the advisory opinion.¹⁷⁹ Requests for advisory opinions are made public, but the FEC is only required to allow ten days for public comment before it issues a final advisory opinion.¹⁸⁰

In 2005, the FEC's enforcement efforts included having its Reports Analysis Division review all reports, audit presidential campaign committees and several dozen candidate campaign committees, and obtain nearly \$2.5 million in civil penalties and fines from 392 closed enforcement cases.¹⁸¹ In 2006, the FEC collected over \$6.2 million in civil penalties and closed 315 cases.¹⁸²

¹⁷⁵ GREGORY J. SCOTT ET AL., FEC, ANNUAL REPORT 2005, at 32-33 (2006) [hereinafter FEC 2005 ANNUAL REPORT], available at <http://www.fec.gov/pdf/ar05.pdf>. President Bush has proposed a budget of \$59.2 million for the FEC for fiscal year 2008. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2008, at 1077 (2007) [hereinafter 2008 BUDGET].

¹⁷⁶ GREGORY J. SCOTT ET AL., FEC, ANNUAL REPORT 2004, at 79 (2005), available at <http://www.fec.gov/pdf/ar04.pdf>. The difference between expenditures and receipts is presumably the result of an organization receiving funds in one calendar year but not spending them until a later year.

¹⁷⁷ See 2 U.S.C. §§ 437f, 438(a)(2), (a)(8).

¹⁷⁸ See *id.* § 437d(a)(8) (subjecting FEC-developed regulations to the Administrative Procedure Act); 5 U.S.C. § 553 (2000) (establishing the general process for rulemaking, including publication of a notice of proposed rulemaking and an opportunity for interested persons to comment).

¹⁷⁹ 2 U.S.C. § 437f(c)(1).

¹⁸⁰ *Id.* § 437f(d).

¹⁸¹ FEC 2005 ANNUAL REPORT, *supra* note 175, at 5, 15.

¹⁸² Press Release, FEC, FEC Posts Record Year, Collecting \$6.2 Million in Civil Penalties (Dec. 28, 2006), available at <http://www.fec.gov/press/press2006/20061228summary.html>.

Information about enforcement matters is publicly available in case files maintained in the FEC's Washington, D.C. office and increasingly online.¹⁸³ Conciliation agreements resolving enforcement actions are also public documents.¹⁸⁴

Both the guidance and enforcement processes require approval from the Commissioners, and they cannot delegate that approval authority.¹⁸⁵ For guidance, the Commissioners must approve both proposed and final regulations, as well as all advisory opinions.¹⁸⁶ For enforcement, the Commissioners are directly involved in essentially every major step of the process, including deciding whether an investigation is warranted, whether there is probable cause to believe a violation has occurred after an investigation is complete, and whether the FEC should accept a negotiated settlement.¹⁸⁷

Candidates who object to FEC-approved regulations generally have standing to challenge such regulations in court.¹⁸⁸ Any person who believes a violation of the election laws has occurred has the right to file a complaint with the FEC.¹⁸⁹ A person who files a complaint with the FEC may also have standing to sue the FEC if it dismisses that complaint or fails to act upon it within a certain amount of time.¹⁹⁰

2. The Internal Revenue Service

The Department of the Treasury administers the federal tax laws, with guidance, collection, and enforcement handled primarily by the IRS.¹⁹¹ The

¹⁸³ FEC 2005 ANNUAL REPORT, *supra* note 175, at 4-5; *see also* FEC, Enforcement Matters, <http://www.fec.gov/em/em.shtml> (last visited June 1, 2007) (containing a searchable database of completed enforcement actions in pdf format, audit reports of authorized, unauthorized, and publicly financed committees, an enforcement profile for the prior fiscal year, and documents detailing enforcement processes).

¹⁸⁴ 2 U.S.C. § 437g(a)(4)(B)(ii).

¹⁸⁵ *Id.* § 437c(c).

¹⁸⁶ *Id.* § 437d(a)(7)-(8).

¹⁸⁷ *Id.* § 437g(a)(2)-(4)(A)(i).

¹⁸⁸ *See Shays v. FEC*, 414 F.3d 76, 83-95 (D.C. Cir. 2005) (concluding that members of the U.S. House of Representatives seeking re-election had standing to challenge FEC regulations implementing the 2002 changes to the election laws).

¹⁸⁹ 2 U.S.C. § 437g(a)(1).

¹⁹⁰ *Id.* § 437g(a)(8)(A); *see FEC v. Akins*, 524 U.S. 11, 19-26 (1998) (applying this statutory provision in holding that filers of a complaint with the FEC had standing to bring a petition challenging the FEC's dismissal of that complaint). The U.S. Court of Appeals for the D.C. Circuit has held, however, that a complainant lacks standing to bring such a suit if the complainant has not sustained an injury in fact or is unable to demonstrate either causation or redressability. *See generally* Citizens for Responsibility & Ethics in Wash. v. FEC, 475 F.3d 337 (D.C. Cir. 2007).

¹⁹¹ *See* 26 U.S.C. §§ 7801(a), 7802(c)(1)(A) (2000) (describing the roles of the Secretary of the Treasury and the IRS Oversight Board).

IRS has a single presidential appointee, the Commissioner, who oversees the agency.¹⁹² The Commissioner is advised by the IRS Chief Counsel's Office, a separate division within the Treasury Department that also has only a single presidential appointee (the Chief Counsel).¹⁹³ The Chief Counsel reports to both the IRS Commissioner and the General Counsel of the Treasury Department.¹⁹⁴

For the federal government's fiscal year ending September 30, 2006, the IRS collected over \$2.2 trillion in taxes, including \$1.34 trillion in income taxes based on 177 million returns.¹⁹⁵ During the same year, it had approximately 92,000 employees and a budget of slightly over \$10.5 billion, of which approximately half was dedicated to enforcement efforts.¹⁹⁶ No break out of expenditures or budgeted amounts relating to the narrow issue of political activity is available, but the IRS Tax-Exempt and Government Entities Division, which oversees all tax-exempt organizations, including charities and 527s, dedicated 472 full-time equivalent staff to exempt organization compliance in the government's fiscal year 2005.¹⁹⁷ Tax-exempt organizations filed approximately 850,000 returns during calendar year 2005, not including initial and periodic reports filed by 527s.¹⁹⁸ The total number of tax-exempt organizations, including houses of worship and other church-related entities that have voluntarily chosen to file for IRS recognition of their tax-exempt status, is over 780,000. These organizations, not including houses of worship and church-related entities, have total annual receipts and expenditures of over \$1 trillion.¹⁹⁹

The Treasury Department provides guidance in numerous forms, including regulations, revenue rulings and procedures, private letter rulings and technical advice memoranda, and public education materials.²⁰⁰ As with the FEC, regulations are subject to the requirements imposed by the Administrative Procedure Act.²⁰¹ Revenue rulings and procedures generally are issued only in

¹⁹² See *id.* § 7803(a)(1)(A), (a)(2).

¹⁹³ See *id.* § 7803(b).

¹⁹⁴ *Id.* § 7803(b)(3).

¹⁹⁵ IRS, DEP'T OF THE TREASURY, PUBL'N NO. 55B, INTERNAL REVENUE SERVICE DATA BOOK, 2006, at 3-4 (2007) [hereinafter IRS 2006 DATA BOOK], available at <http://www.irs.gov/pub/irs-soi/06databk.pdf>.

¹⁹⁶ *Id.* at 64, 68. The proposed fiscal year 2008 budget for the IRS is approximately \$11.1 billion. 2008 BUDGET, *supra* note 175, at 876.

¹⁹⁷ 1 TAXPAYER ADVOCATE SERV., IRS, NATIONAL TAXPAYER ADVOCATE: 2005 ANNUAL REPORT TO CONGRESS 295 (2005).

¹⁹⁸ IRS 2006 DATA BOOK, *supra* note 195, at 32.

¹⁹⁹ Paul Arnsberger, *Charities and Other Tax-Exempt Organizations*, 2003, SOI BULL., Fall 2006, at 231, 242, available at <http://www.irs.gov/pub/irs-soi/06fallbul.pdf>.

²⁰⁰ See 26 U.S.C. § 7805(a), (c) (2000).

²⁰¹ See MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 1.03 (rev. 2d ed. 2002-2005).

final, not proposed, form.²⁰² Private letter rulings and technical advice memoranda are similar to FEC advisory opinions, but legally only the taxpayer requesting them may rely on them,²⁰³ although as a practical matter other taxpayers often do rely on them. Unlike advisory opinions, however, IRS private letter rulings and technical advice memoranda, as well as background documents relating to them, including the request for a ruling, are made public only after all identifying information for the taxpayer involved has been redacted.²⁰⁴

Given the vast number of filings received by the IRS, it is not surprising that its enforcement is somewhat spotty. With respect to tax-exempt organizations, the IRS audited approximately 7000 of the returns processed during calendar year 2005, or approximately 0.8%.²⁰⁵ All information about specific audits, and about specific taxpayers and their returns generally, is confidential and so the government may not disclose that information to the public.²⁰⁶ The major exception to this general rule is that applications for tax-exempt status and returns filed by tax-exempt organizations are generally available to the public, including filings by 527s, although with the exception of filings by 527s, the IRS does not make such filings available on the Internet.²⁰⁷ The IRS also issues a public announcement when it revokes the tax-exempt status of an organization and makes all denials or revocations of tax-exempt status available in redacted form.²⁰⁸

The guidance process is handled by Treasury Department staff, who report to the Assistant Secretary for Tax Policy, a presidential appointee, and by IRS and IRS Chief Counsel employees.²⁰⁹ The enforcement process is handled by the IRS, with legal advice provided by the IRS Chief Counsel's office.²¹⁰ While the IRS is regularly accused of using the audit process for political purposes,²¹¹ recent investigations have not found any such misuse.²¹² The IRS

²⁰² See IRS, U.S. Dep't of the Treasury, Understanding IRS Guidance – A Brief Primer, <http://www.irs.gov/irs/article/0,,id=101102,00.html> (last visited June 1, 2007) (describing revenue rulings, revenue procedures, and other forms of IRS guidance).

²⁰³ See 26 U.S.C. § 6110(k)(3).

²⁰⁴ See *id.* § 6110(a)-(c).

²⁰⁵ IRS 2006 DATA BOOK, *supra* note 195, at 32. This compares to an audit rate of approximately 1.0% for individual taxpayers and 1.2% for corporate taxpayers. *Id.* at 23.

²⁰⁶ See 26 U.S.C. § 6103(a)-(b) (2000 & Supp. IV 2004) (providing generally that tax returns and tax return information are confidential).

²⁰⁷ See *id.* § 6104.

²⁰⁸ See *Tax Analysts v. IRS*, 350 F.3d 100, 101-05 (D.C. Cir. 2003) (holding that the IRS must disclose denials or revocations of tax exemptions in redacted form).

²⁰⁹ See SALTZMAN, *supra* note 201, ¶ 1.01[2].

²¹⁰ See *id.* ¶ 1.02[4][a].

²¹¹ See, e.g., STAFF OF J. COMM. ON TAXATION, 106TH CONG., REPORT OF INVESTIGATION OF ALLEGATIONS RELATING TO INTERNAL REVENUE SERVICE HANDLING OF TAX-EXEMPT ORGANIZATION MATTERS 12-13 (Comm. Print 2000) (summarizing allegations that the IRS was engaged in politically targeted examinations of tax-exempt organizations).

has a longstanding policy of shielding political appointees from involvement in almost all specific taxpayer matters.²¹³

Only directly affected taxpayers have standing to challenge Treasury Department regulations or IRS enforcement actions, i.e., only taxpayers who have had their tax bills increased (or claim of tax-exempt status denied) as a result of application of the regulation or enforcement action at issue. For example, a third party generally does not have standing to challenge the IRS's decision to grant tax-exempt status to a particular organization.²¹⁴ Similarly, while members of the public are free to file complaints with the IRS, they do not have standing to go to court to force IRS action on such complaints or even to know whether in fact there has been any IRS action.

3. Comparing the Agencies

The specialization of the FEC is both its strength and, at least as it is currently structured, its weakness. With administering election law as its sole function, the FEC necessarily has developed an expertise in the area of political activity. It also is highly accountable for its administration of that law, for it can neither point to another responsible party nor claim the press of other priorities when confronted with criticism about the interpretation or enforcement of election law. Its focus on enforcing the rules requiring the disclosure of – and with respect to contributions restriction of – political activities also suggests that it is best suited to coordinate any future laws in those areas to ensure complete coverage and to avoid unnecessary duplication of reporting or contradictory rules. The results of the FEC enforcement process are also publicly available, and the party who initially filed a complaint may be able to challenge the result in court.²¹⁵

²¹² See, e.g., *id.* at 6-11 (finding in general no credible evidence of improper use of taxpayer information or conduct of audits, including for political purposes); INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2005-10-035, REVIEW OF THE EXEMPT ORGANIZATIONS FUNCTION PROCESS FOR REVIEWING ALLEGED POLITICAL CAMPAIGN INTERVENTION BY TAX EXEMPT ORGANIZATIONS 1-2 (2005), available at <http://www.ustreas.gov/tigta/auditreports/2005reports/200510035fr.pdf> (concluding that there were no indications of inappropriate actions, including political influence, in the IRS's process for reviewing alleged political campaign intervention by § 501(c)(3) organizations and initiating associated examinations of these organizations).

²¹³ STAFF OF J. COMM. ON TAXATION, *supra* note 211, at 96.

²¹⁴ See *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 28 (1976) (holding that indigents and organizations composed of indigents who asserted that the IRS violated the Internal Revenue Code of 1954 and the Administrative Procedure Act by issuing a Revenue Ruling allowing favorable tax treatment to a nonprofit hospital lacked standing to bring this suit).

²¹⁵ See *supra* notes 183-84, 190 and accompanying text.

The Treasury Department and the IRS, in contrast, have a mandate that encompasses a much larger area than just political activities.²¹⁶ Even the Exempt Organizations Division, which has jurisdiction over 527s and other tax-exempt organizations engaged in political activities, has to pursue numerous objectives unrelated to political activity.²¹⁷ This limits the ability of the IRS to gain expertise with respect to political activities and also limits its accountability for regulating in this area since it can easily and legitimately plead the press of other priorities. The IRS's general focus on directing funds into the right tax channel, as opposed to causing the disclosure of those flows of funds or imposing limitations on them, also suggests that its only coordination strength is with respect to the taxation or lack thereof of political activity expenditures. While issues relating to charities, including alleged political activities, do tend to attract media attention, the fact that the IRS must keep the details of particular investigations confidential limits the extent to which such attention holds the IRS accountable for the conduct of examinations.

The FEC's specialization, which generates such a favorable comparison to the IRS with respect to expertise and accountability, also creates a substantial weakness, however: the apparent capture of the FEC by a significant portion of its regulated population, specifically incumbent politicians.²¹⁸ The FEC Commissioners, all of whom are political appointees, have to approve not only all guidance processes, but also each significant step of every enforcement action.²¹⁹ This structural constraint naturally leads to the suspicion that both the guidance and enforcement processes will be biased toward a lack of regulation that furthers the interests of those who appointed the Commissioners.²²⁰ This suspicion has been confirmed in part by the recent

²¹⁶ See, e.g., OFFICE OF TAX POLICY & IRS, 2006-2007 PRIORITY GUIDANCE PLAN 1-21 (2006), available at http://benefitslink.com/IRS/20060815_priority_guidance_plan.pdf (listing 264 guidance projects, of which only two are related to political activity).

²¹⁷ See, e.g., TAX EXEMPT & GOV'T ENTITIES DIV., IRS, FY 2007 EXEMPT ORGANIZATIONS (EO) IMPLEMENTING GUIDELINES 12-19 (2006), available at http://www.irs.gov/pub/irs-tege/fy07_implementing_guidelines.pdf (describing the Exempt Organizations Division's priorities for the upcoming fiscal year, and recognizing that out of thirteen new projects and "critical initiatives," only one involves political activity).

²¹⁸ E.g., JACKSON, *supra* note 174, at 1-2.

²¹⁹ See *supra* notes 185-87 and accompanying text.

²²⁰ See Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891, 1895-96 (1999) (describing the widespread belief among FEC critics that the FEC has been captured by political players and so is willfully complacent, but recognizing the difficulty of proving that this capture, as opposed to a lack of resources or inherent flaws in election law, is the source of the FEC's ineffectiveness); Trevor Potter & Glen Shor, *Lessons on Enforcement from McConnell v. FEC*, 3 ELECTION L.J. 325, 330-32 (2004) (citing *McConnell* as an express and implicit indictment of the FEC's performance in interpreting the election laws).

success of court challenges to a series of FEC-approved regulations interpreting the 2002 election law changes.²²¹

The Treasury Department and the IRS, in contrast, have numerous structural and practical constraints preventing such capture. The size of the tax apparatus and the breadth of its mission make it very difficult as a practical matter for the few political appointees, or even those who directly report to them, to become personally involved in many guidance or enforcement projects, as mentioned earlier.²²² With respect to enforcement, the IRS informal procedures generally exclude political appointees from decision making.²²³ This insulation from political influences is only strengthened by the risk of harm to the IRS's reputation as a neutral and fair tax collector if any accusations of political bias were found to be true, as shown by the alacrity with which the Commissioner has sought investigations to counter accusations of such improper influence.²²⁴

These observations suggest that if the capture issue could be overcome or at least sufficiently addressed, the FEC's advantages with respect to expertise, accountability, and coordination would make election law the better vehicle for disclosure requirements and restrictions on political activity. The extent of this capture problem will be addressed in the next section, while the issue of whether it can be sufficiently addressed will be discussed in Part IV.

C. *Effectiveness*

The sharp differences between election law and tax law also extend into the issue of the relative effectiveness of each body of law with respect to the regulation of political activity. For the reasons already noted, the FEC has a substantial enforcement advantage over the IRS, although that advantage is reduced by the FEC's apparent capture by incumbent politicians. Regulating political activity through election law also appears to create a lower

²²¹ *Shays v. FEC*, 337 F. Supp. 2d 28, 130-31 (D.D.C. 2004) (remanding fourteen of eighteen challenged regulations back to the FEC for reconsideration because of failure either to interpret the relevant statute properly or to comply with the Administrative Procedure Act), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005); *see also* *Shays v. FEC*, 424 F. Supp. 2d 100, 117 (D.D.C. 2006) (concluding that the FEC failed to present a reasoned explanation for its failure to promulgate a general rule regarding when a 527 must register as a political committee and remanding the matter to the FEC for further proceedings). A challenge to the regulations adopted by the FEC relating to certain soft money solicitation rules and the definitions of "coordinated communications" and "[f]ederal election activity" is currently pending in the U.S. District Court for the District of Columbia. Complaint for Declaratory and Injunctive Relief at 1, *Shays v. FEC*, No. 1:06CV01247 (D.D.C. July 11, 2006).

²²² *See supra* notes 192-93, 195-96 and accompanying text.

²²³ *See supra* note 213 and accompanying text.

²²⁴ *See, e.g.*, INSPECTOR GEN. FOR TAX ADMIN., *supra* note 212, at 1 (indicating that it received requests in November 2004 from both the IRS Commissioner and the head of the IRS Tax-Exempt/Government Entities Division to evaluate the process the IRS used to review allegations of potential political activities by tax-exempt organizations in 2004).

compliance burden, given that most existing limits and disclosure requirements for political activity are already found in that body of law. And finally, the fact that it is well established that tax law permits types of organizations other than 527s to engage in political activity as long as that activity is funded with after-tax dollars creates a significant potential for regulatory arbitrage if restrictions are imposed based on the categorization of a group as a 527.

1. Enforcement

A comparison of the actual enforcement of both bodies of law in the hands of their implementing agencies reveals several striking contrasts. By almost every measure, the FEC has proportionately greater resources to dedicate to enforcement. Making the assumption that no more than one-third of the FEC's staff, or approximately 130 employees, are dedicated to enforcement,²²⁵ they only have to be concerned with approximately 10,000 organizations and cash flows of less than ten billion dollars annually.²²⁶ The IRS, by comparison, has almost 500 employees dedicated to enforcement in its Exempt Organizations Division, or about four times the number at the FEC, but their oversight encompasses both a number of organizations and a total annual cash flow that is almost 100 times greater.²²⁷

This difference is reflected in the enforcement coverage by the two agencies. The FEC's staff actually reviews, at least in a cursory fashion, every form filed with the FEC and resolves several hundred enforcement actions a year involving at least three to four percent of filing organizations.²²⁸ The IRS makes no pretense that it reviews all of the 850,000 returns filed by tax-exempt organizations or even all of the periodic or annual filings by 527s, and its audit coverage reaches less than one percent of the returns filed.²²⁹ While in theory the IRS's lack of audit coverage could be fixed simply by dedicating more resources to this area, regulation of political activity has to compete within the

²²⁵ See *supra* note 175 and accompanying text. The findings of a 1999 report on the FEC indicate that this percentage is a reasonable assumption. See PRICEWATERHOUSECOOPERS LLP, TECHNOLOGY AND PERFORMANCE AUDIT AND MANAGEMENT REVIEW OF THE FEDERAL ELECTION COMMISSION ES-5 (1999), available at <http://www.gao.gov/special.pubs/fecrpt.pdf> (finding that thirty-one percent of the FEC's staff time was dedicated to compliance).

²²⁶ See *supra* note 176 and accompanying text. This is not to say that the FEC has more enforcement resources than it can use, but simply that in comparison to the level of resources that the IRS dedicates or can realistically dedicate in the future to political activities, the FEC's level of resources is substantially greater. See, e.g., Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMIN. L. REV. 575, 579-83 (2000) (describing the FEC's need for greater resources).

²²⁷ See *supra* notes 197, 199 and accompanying text.

²²⁸ See *supra* note 181 and accompanying text.

²²⁹ See *supra* note 205 and accompanying text.

IRS with efforts to close a tax gap of hundreds of billions of dollars annually²³⁰ and within the federal government with such pressing priorities as the Iraq war, the war against terrorism, and predicted shortfalls in entitlement programs.

The FEC and the IRS also have substantially different reaction speeds. While critics of the FEC complain that it can take a year or two for the FEC to resolve a complaint of election law violations²³¹ – a reasonable critique, given that this is an eternity in the fast-paced world of politics – the IRS pace of enforcement is much slower. Given that the IRS by necessity audits returns filed after the end of the year in which the activity reported occurred and, if it determines tax is owed, can always impose interest to compensate for any delays, it is used to conducting audits that do not even *start* until one or more years after the activity at issue occurred.²³² And audits can drag on for years, particularly when they are politically sensitive. For example, while the audit of the NAACP for alleged political activity inconsistent with its status as a charity began remarkably promptly – in October 2004 when the speech at issue occurred in July 2004 – it took almost two years for the IRS to determine that the NAACP had not in fact violated the § 501(c)(3) prohibition on political activity.²³³

But do these differences also translate into more effective enforcement? Here the picture is mixed. Looking first at disclosure, it is generally agreed that the FEC currently manages to obtain and disseminate in a timely and readily accessible manner the information organizations and individuals must disclose to it under existing election law.²³⁴ Ironically, the alleged focus of the

²³⁰ See U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-06-453T, TAX GAP: MAKING SIGNIFICANT PROGRESS IN IMPROVING TAX COMPLIANCE RESTS ON ENHANCING CURRENT IRS TECHNIQUES AND ADOPTING NEW LEGISLATIVE ACTIONS 1-2, 6-7 (2006) [hereinafter GAO TAX GAP REPORT].

²³¹ Thomas & Bowman, *supra* note 226, at 589 (describing how the enforcement process can cause even a fairly routine matter to take a year for the FEC to resolve); see also Lochner & Cain, *supra* note 220, at 1915-16 (finding that the FEC resolved seventy percent of randomly selected complaints filed in 1991 and 1993 within two years, although indicating that this figure is misleading both because it is the more complex disputes that undoubtedly take longer and because even two years is a long time in politics).

²³² In evaluating the earned income tax program, Professor Alstott noted a similar responsiveness issue in that the tax system's annual accounting interval makes it impossible for that system to respond quickly to a taxpayer's changing financial circumstances. See Alstott, *supra* note 113, at 579-84.

²³³ See Fred Stokeld, *Documents Show Republican Lawmakers Contacted IRS About NAACP*, TAX NOTES TODAY, May 19, 2006, LEXIS, 2006 TNT 97-3; Press Release, NAACP, IRS Determines NAACP Should Retain Tax Exempt Status (Aug. 31, 2006), available at <http://www.naacp.org/legal/news/2006-08-31/index.htm>.

²³⁴ See *Oversight of the Federal Election Commission: Hearing Before the S. Comm. on Rules & Admin.*, 108th Cong. (2004) (testimony of Sen. Feingold); PRICEWATERHOUSECOOPERS LLP, *supra* note 225, at ES-3 to ES-5, 3-5 to 3-6; FRANK J. SORAUF, MONEY IN AMERICAN ELECTIONS 250-51 (1988); see also *Oversight of the Federal*

FEC on trivial and technical violations of the law,²³⁵ if true, probably means that disclosure failures receive a disproportionate level of attention. The IRS record on disclosure pales in comparison. The rapidly constructed IRS website for filings by 527s is difficult to use and search according to third parties.²³⁶ And 527s fail to make many required filings. Even when they do file, they often make incomplete filings according to the Treasury Inspector General for Tax Administration.²³⁷

While the IRS has announced increased enforcement measures to combat these problems,²³⁸ its success with other publicly available filings raises concerns about the effectiveness of those measures. The annual information

Election Commission, supra (testimony of Trevor Potter) (acknowledging that “[t]he FEC has always been known for its high-quality disclosure office,” but also asserting that the FEC’s failure to penalize political committees for failing to register and file reports undermines disclosure); Kenneth P. Doyle, *Watchdog Says FEC Policy Fall Short of Full Disclosure of Campaign Spending*, [2006] Money & Pol. Rep. (BNA) (Dec. 27, 2006) (describing competing views by outside observers regarding whether the FEC is seeking enough or too much detail in campaign finance reports).

²³⁵ See Mutch, *supra* note 18, at 94 (summarizing such allegations); Lochner & Cain, *supra* note 220, at 1897 (concluding, based on an analysis of randomly selected enforcement actions in 1991 and 1993, that the FEC “spend[s] the bulk of its resources pursuing relatively technical or trivial violations”). The FEC has recently sought to address this concern by implementing an abbreviated enforcement process for late or non-filed disclosure reports. FEC 2005 ANNUAL REPORT, *supra* note 175, at 11-13 (describing the Administrative Fine Program, under which the Commission may assess civil fines for late and non-filed reports).

²³⁶ See CONG. WATCH, PUB. CITIZEN, OFF TO THE RACES: FIRST QUARTER REPORTS SHOW THAT 50 TOP “527” ORGANIZATIONS COLLECTED ALMOST \$11 MILLION IN SOFT MONEY; DISCLOSURE PROBLEMS CONTINUE 4-6 (2002), available at http://www.citizen.org/documents/1stQ2002_527Report.pdf (reporting on problems with the IRS’s website for tracking 527 organizations); U.S. GEN. ACCOUNTING OFFICE, NO. GAO-02-444, POLITICAL ORGANIZATIONS: DATA DISCLOSURE AND IRS’S OVERSIGHT OF ORGANIZATIONS SHOULD BE IMPROVED 8-14 (2002) (detailing concerns about difficulties with using the IRS website and flaws with planned IRS efforts to address these concerns). There do not appear to have been any reports since 2002, so the degree to which the IRS has addressed these initial problems is unknown.

²³⁷ INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2005-10-125, ADDITIONAL ACTIONS ARE NEEDED TO ENSURE SECTION 527 POLITICAL ORGANIZATIONS PUBLICLY DISCLOSE THEIR ACTIVITIES TIMELY AND COMPLETELY 5-6 (2005), available at <http://www.treasury.gov/tigta/auditreports/2005reports/200510125fr.pdf> (concluding, based on a statistically valid sample of the 527 filings and without independently verifying any of the submitted information, that 7% of 527s failed to file a timely initial report, 13% failed to file one or more required periodic reports, and of those that did file the required periodic reports, 22% did not include all of the required information).

²³⁸ I.R.S. News Release IR-2004-110 (Aug. 19, 2004), available at <http://www.irs.gov/newsroom/article/0,,id=128521,00.html>; see also I.R.S. Notice 2002-34, 2002-1 C.B. 990 (announcing a voluntary compliance program permitting 527s to file all required forms by July 15, 2002, without penalty to promote disclosure by 527 organizations).

returns filed by most tax-exempt organizations are also public documents.²³⁹ Aside from the returns for 527s, only the returns for charities are readily available on the Internet, however, and only because a private party created an Internet site for posting these returns using non-governmental funds.²⁴⁰ There is no indication that the returns for other types of tax-exempt organizations (other than 527s) will be readily accessible in the near future absent such private party intervention. Finally, the accuracy of these returns has been subject to longstanding criticism, particularly with respect to information regarding political activity.²⁴¹ The IRS is unlikely to address this criticism in the near future given the less than one percent audit rate for such returns.²⁴²

The enforcement of funding and other restrictions presents a somewhat different picture. Supporters and critics differ over whether the FEC engages in effective enforcement of such restrictions.²⁴³ The main barrier cited by critics remains the enforcement structure that requires a majority of the politically appointed Commissioners to approve each significant step for every enforcement action.²⁴⁴ Critics have alleged that these flaws have allowed purported PACs to escape their filing obligations, permitted political parties and candidates (as opposed to corporations and individual contributors) to escape the imposition of fines, and led to a reduction in new enforcement

²³⁹ See *supra* note 207 and accompanying text.

²⁴⁰ See GuideStar, <http://www.guidestar.org> (last visited June 1, 2007) (providing information on over 1.5 million charities and operated by the charity Philanthropic Research, Inc.).

²⁴¹ See, e.g., Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 281-82 (2004) (commenting on the apparent paucity of IRS enforcement actions and minimal penalties for tax-exempt organization reporting failures); Stephen R. Weissman & Kara D. Ryan, *Nonprofit Interest Groups' Election Activities and Federal Campaign Finance Policy*, 54 EXEMPT ORG. TAX REV. 21, 26-27 (2006) (reporting that of the non-527 tax-exempt organizations studied, some were failing to report some or all of their political activity in part because of inadequate IRS oversight).

²⁴² See *supra* note 205 and accompanying text.

²⁴³ For the best articulation of the view that the FEC enforcement is, if anything, too aggressive, see generally Bradley A. Smith & Stephen M. Hoerding, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, 1 ELECTION L.J. 145 (2002).

²⁴⁴ See, e.g., Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 286 (1991) (citing "party-line deadlocks" as one barrier to the FEC investigating violations of the law); John McCain, *Reclaiming Our Democracy: The Way Forward*, 3 ELECTION L.J. 115, 119 (2004) (citing the majority vote requirement as making the FEC "structured to fail"). The FEC also lacks a chief executive position, instead having a rotating "Chairman," whose primary duties are to preside over meetings and testify before Congress, and two staff members, the general counsel and a staff director, who both report directly to the Commissioners and neither of whom report to the other. See 2 U.S.C. § 437c(c) (2000); Mutch, *supra* note 18, at 103.

cases.²⁴⁵ Statistics on the degree of enforcement, or lack thereof, are difficult to obtain and interpret; anecdotal evidence indicates some recent increase in enforcement, but how this compares to the actual number of violations is unclear.²⁴⁶

The IRS, in contrast, has relatively detailed statistics about its level of general enforcement of the rules governing tax-exempt organizations as reflected in audit rates. The problem is that audit rates for tax-exempt organizations (and generally) are very low,²⁴⁷ either indicating a relatively compliant regulated community or a relative lack of enforcement. The most documented area relating to political activity is with respect to the prohibition on charities engaging in political activity, but even there the number of audits were few and most resulted in only a warning, even when the IRS found a violation²⁴⁸ – again indicating either a generally law-abiding community or a lack of effective enforcement.

²⁴⁵ See, e.g., *Oversight of the Federal Election Commission*, *supra* note 234 (testimony of Trevor Potter) (declaring that the FEC's enforcement powers are "cripplingly weak"); JACKSON, *supra* note 174, at 1 (asserting that the Commissioners often overrule FEC staff recommendations to investigate suspected infractions); PRICEWATERHOUSECOOPERS LLP, *supra* note 225, at 3-6 to 3-7 (citing the consensus of eight interviewed legal practitioners that the enforcement process took a long time to resolve alleged violations and reporting that most of them believed that the then current FEC enforcement did not create a strong deterrent effect); SORAUF, *supra* note 234, at 254-57 (pronouncing general agreement, at least in 1988, that the FEC's enforcement efforts were both slow and timid, and attributing these flaws primarily to congressional efforts to keep its enforcement efforts limited).

²⁴⁶ E.g., Kenneth P. Doyle, *Former MZM Employee Pleads Guilty to Making Illegal Campaign Donations*, 1 White Collar Crime Rep. (BNA) No. 14, at 440 (Aug. 4, 2006); Ralph Lindeman, *Rep. Meeks Cited for Campaign Violations in Recent Audit Report Issued by FEC Staff*, [2006] Money & Pol. Rep. (BNA) (Aug. 28, 2006); Press Release, FEC, Federal Home Loan Mortgage Corporation ("Freddie Mac") Pays Largest Fine in FEC History (Apr. 18, 2006), available at <http://www.fec.gov/press/press2006/20060418mur.html> (reporting that Freddie Mac had agreed to pay a \$3.8 million civil penalty to settle allegations that it had violated various election laws). This recent apparent increase in enforcement has included the imposition of financial penalties on 527s that improperly tried to avoid registering with the FEC as a political committee. See, e.g., Press Release, FEC, FEC Collects \$630,000 in Civil Penalties from Three 527 Organizations (Dec. 13, 2006), available at <http://www.fec.gov/press/press2006/20061213murs.html>.

²⁴⁷ See *supra* note 205 and accompanying text.

²⁴⁸ During the 2004 election year, the IRS initiated either examinations or, in the case of churches and other houses of worship, inquiries of 132 organizations. See IRS, FINAL REPORT: PROJECT 302: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE 5 (2005) [hereinafter FINAL REPORT], available at http://www.irs.gov/pub/irs-tege/final_paci_report.pdf. This compares to the approximately 250,000 charities that filed annual information returns for 2002 (the latest year for which filing data is available from the IRS); the IRS also estimates there are 500,000 additional charities that are active but are not required to file such returns either because they are houses of worship and church-related organizations or because they have a relatively low level of financial activity. Arnsberger, *supra* note 199, at 1 & n.1. Of

There are reasons to suspect that the latter is the larger part of the explanation.²⁴⁹ The IRS has particular difficulty in enforcing the tax laws when there is a lack of third-party reporting of a taxpayer's activities.²⁵⁰ With respect to tax-exempt organizations, the IRS rarely challenges the tax-exempt status of a charity because of political activity, and then usually only in the most egregious cases.²⁵¹ More questionable cases tend to become bogged down in the enforcement process, with the IRS often sitting on them for years – whether in the hopes of wearing down the organization involved or out of sheer inertia, it is unclear. And the most politically sensitive cases tend to be the ones for which IRS action is most delayed. For example, the IRS did not rule on the Christian Coalition's application for tax-exempt status under § 501(c)(4) for nine years. IRS then litigated the denial of that status for another five years and recently agreed to grant that status subject to certain conditions.²⁵² The FEC case against the Christian Coalition, by comparison,

the eighty-two closed cases, no political activity was found in eighteen cases, and fifty-six led to findings of minor or isolated incidences of political activity. Of the remaining eight cases, five led to the filing of corrected or delinquent returns and three to proposed revocation. FINAL REPORT, *supra*, at 18-19; IRS, 2004 Political Activity Compliance Initiative (PACI) Summary of Results (Feb. 23, 2006), http://www.irs.gov/pub/irs-tege/one_page_statistics.pdf. The organizations involved have appealed four of the closed cases within the IRS, which likely include all three proposed revocations. See FINAL REPORT, *supra*, at 18.

²⁴⁹ At least one watchdog organization has asserted that the IRS is exaggerating the extent to which charities violate the § 501(c)(3) prohibition on political activity, but that organization bases its criticism primarily on the fact that the IRS has determined that an actual violation occurred in less than forty percent of recent investigations of alleged violations. OMB WATCH, THE IRS POLITICAL ACTIVITIES ENFORCEMENT PROGRAM FOR CHARITIES AND RELIGIOUS ORGANIZATIONS: QUESTIONS AND CONCERNS 1, 8-9 (2006), available at http://www.ombwatch.org/pdfs/paci_full.pdf. But anecdotal information indicates that at least minor violations may be relatively widespread, even if not investigated by the IRS. See, e.g., John Fritze, *Political Gifts by Churches Break IRS Rules: At Least 115 in Maryland Have Donated Money to Candidates Since 2000*, BALT. SUN, Feb. 26, 2006, at 1A (concluding that over six years, 115 churches in Maryland had made contributions to candidates, based on a review of candidate finance reports).

²⁵⁰ See GAO TAX GAP REPORT, *supra* note 230, at 1-2, 6-7 (concluding that the tax gap in the hundreds of billions of dollars annually is primarily because of underreporting of income).

²⁵¹ See *supra* note 248.

²⁵² See Complaint for Tax Refund, *Christian Coal. Int'l v. United States*, No. 2:01-cv-377 (E.D. Va. Feb. 25, 2000), reprinted in TAX NOTES TODAY, Mar. 1, 2000, LEXIS, 2000 TNT 41-49; Gregory L. Colvin, *IRS Gives Christian Coalition a Green Light for New Voter Guides*, TAX NOTES TODAY, Oct. 27, 2005, LEXIS, 2005 TNT 207-29 (analyzing the successful revised application by the Christian Coalition International for recognition of exemption); Fred Stokeld, *IRS Grants Exempt Status to Christian Coalition International*, TAX NOTES TODAY, Oct. 27, 2005, LEXIS, 2005 TNT 207-6 (reporting that the IRS granted tax-exempt status to the Christian Coalition International based on its "revised operations").

was resolved in seven years from the date of the first complaint until a court decision, although in the end a court found only relatively minor violations of election law,²⁵³ and the FEC chose not to appeal the court's interpretation of the circumstances under which the FEC could regulate coordination practices under FECA.²⁵⁴

2. Compliance Burden

Individuals and organizations that engage in political activities are already used to being subject to both election law and tax law, at least potentially, and so placing new rules in either body of law should at first glance not result in significant compliance burden differences. But that first glance is deceptive because it ignores the fact that until enactment of the 527 disclosure rules, compliance with the tax law for 527s was very simple – a single one-page filing requirement – and then only if the 527 had non-contribution income in excess of \$100.²⁵⁵ All of the complex issues for 527s involved the election law and dealing with the FEC. The creation of overlap between election law and tax law through the 527 disclosure rules increased the administrative burdens of 527s by sharply increasing their responsibilities under the tax law and thus their potential interactions with the IRS as well as the FEC. The extra cost associated with having to deal on a more regular basis with two agencies as opposed to a single one is difficult to measure, but it certainly comes with some costs.

This shift to dual authority may also increase compliance burdens by forcing 527s to deal much more extensively with an agency – the IRS – with which they have not had an opportunity to develop informal norms and procedures for interaction. This lack of such informal mechanisms may also decrease the effectiveness of enforcement, as the IRS seeks to learn how to deal more extensively with a new set of organizations.²⁵⁶

The government's pending case against the Democratic Leadership Council (DLC), alleging that the DLC does not qualify for tax-exempt status under § 501(c)(4) because it operates for the private benefit of Democratic officeholders and political candidates, shows similar signs of dragging on for many years. See Kenneth P. Doyle, *Lawyers Decline Comment on Stalled Case Seeking Exempt Status of Democratic Group*, [2007] Money & Pol. Rep. (BNA) (June 13, 2007).

²⁵³ See generally *FEC v. Christian Coal.*, 52 F. Supp. 2d 45 (D.D.C. 1999) (finding that the defendant violated prohibitions against advocating for a candidate or making contributions through voter guides and providing a mailing list). Neither side appealed the decision.

²⁵⁴ See General Counsel's Report at 9-11, *In re AFL-CIO*, MUR 4291 (FEC 2000), available at <http://eqs.nictusa.com/eqsdocs/000008FC.pdf>.

²⁵⁵ See *supra* note 93 and accompanying text.

²⁵⁶ See *Lochner & Cain*, *supra* note 220, at 1900-01 (describing how an effective enforcement strategy requires the fostering of long-term relationships with regulatees who are repeat players to establish such informal mechanisms).

3. Regulatory Arbitrage Opportunities

Regulatory arbitrage generally exists when an entity can choose under which of two or more regulatory structures it will operate, thereby giving the entity the opportunity to choose the structure with the lowest regulatory burdens.²⁵⁷ It can also exist when different types of entities can engage in the same activity but be subject to different regulatory structures.²⁵⁸ In that situation, the decision is whether the cost, if any, of operating through a particular type of entity justifies the lower regulatory burden achieved.

The concerns that gave rise to the 527 disclosure rules are an example of such regulatory arbitrage. Congress had apparently assumed that no tax law disclosure rules had to apply to 527s because federal and state election law disclosure rules already applied to 527s.²⁵⁹ Political operatives eventually discovered, however, that this assumption was not true: if they were willing to curtail their actions in certain ways to avoid activities clearly subject to election law (i.e., campaign contributions and express advocacy) they could create 527s that were not subject to election law disclosure requirements.²⁶⁰ The activities of these so-called “stealth PACs” were in many ways identical to the activities of political party committees and candidates, but by paying the cost of avoiding certain activities the “stealth PACs” received the benefit of avoiding election law disclosure rules and restrictions.

Do the current and proposed rules relating to 527s create similar opportunities for regulatory arbitrage? They do in one very significant way. By targeting an organization type, instead of an activity type, the existing disclosure rules and the proposed rules for imposing restrictions on 527s only reach 527s. Organizations other than 527s can engage in the exact same activities as those conducted by 527s – political activity as broadly defined for tax purposes – creating an arbitrage opportunity.²⁶¹ This choice comes at a

²⁵⁷ This concept tends to be used primarily in the context of regulating business transactions. See generally Rob Frieden, *Regulatory Arbitrage Strategies and Tactics in Telecommunications*, 5 N.C. J.L. & TECH. 227 (2004) (discussing regulatory differences and how they are exploited amongst telecommunications carriers); Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets*, 38 VA. J. INT'L L. 563 (1998) (discussing arbitrage in the context of the globalization of stock markets and listing and selling stocks in foreign markets); Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211 (1997) (introducing a model of regulatory arbitrage and explaining conditions requisite for the efficient derivatives regulation).

²⁵⁸ See generally William J. Carney, *The Costs of Being Public After Sarbanes-Oxley: The Irony of “Going Private,”* 55 EMORY L.J. 141 (2006) (discussing the increasing regulatory burdens on public companies that therefore encourage businesses to shift to a private company form despite the costs of doing so).

²⁵⁹ See *supra* note 97 and accompanying text.

²⁶⁰ See *supra* note 91 and accompanying text.

²⁶¹ See *supra* notes 65, 80 and accompanying text. Tax law therefore provides a taxpayer with the ability to choose between a variety of organizational structures to engage in

significant cost, however, for other types of tax-exempt organizations: a non-527 must engage in, and obtain sufficient funding for, non-political activity at a scale sufficient to make it the organization's primary purpose.²⁶² There is also the risk that the gift tax will apply to large donors, although both the annual exemption (currently \$12,000)²⁶³ and the uncertainty of both the gift tax's application and enforcement²⁶⁴ reduce this risk to some degree. The continued high level of funding for 527s²⁶⁵ indicates that these costs are generally too high to pay to avoid the disclosure rules.²⁶⁶ This conclusion is necessarily tentative, however, since it is unclear to what extent political activity has shifted to non-charitable tax-exempt organizations other than 527s and whether that shift will increase over time.²⁶⁷

Requiring all 527s to submit to the PAC restrictions on contributions, as currently proposed, would significantly increase the benefits from shifting activities from a 527 to another type of non-charitable tax-exempt organization. What may currently be a trickle²⁶⁸ of funds moving from 527s to

political activity, with Congress not having a strong preference between the choices since all of them lead to the same tax result: use of after-tax dollars to pay for political activity.

²⁶² See *supra* note 65 and accompanying text.

²⁶³ See 26 U.S.C. § 2503(b) (2000 & Supp. IV 2004) (providing the unadjusted by inflation annual exemption); Rev. Proc. 2006-53 § 3.32, 2006-48 I.R.B. 996, 1003 (providing the inflation-adjusted annual exemption for 2007).

²⁶⁴ See *supra* notes 77-78 and accompanying text.

²⁶⁵ See *supra* note 106 and accompanying text.

²⁶⁶ But see Weissman & Ryan, *supra* note 241, at 29-34 (detailing how certain well-funded and prominent organizations have chosen not to use 527s but to instead direct their political activity that is not subject to election law through other types of tax-exempt organizations). The ability of at least well-advised and well-funded entities to change their tax classification is not new. See, e.g., Karen Gullo, *IRS Rules Will Let Donors to "Civic" Groups Stay Secret*, DENVER POST, Oct. 24, 1997, at A32 (reporting that two groups that spent three million dollars in 1996 to support or oppose candidates shifted from 501(c)(4) to 527 status in the face of congressional and public scrutiny).

²⁶⁷ See Weissman & Ryan, *supra* note 241, at 22-23, 35-37 (explaining that many organizations engaged in political activity create a constellation of entities to pursue such activity, often including 527s and non-charitable tax-exempt organizations, and observing the potential of such entities to shift political activities from the former to the latter if faced with additional regulation of 527s); CONG. WATCH, PUB. CITIZEN, THE NEW STEALTH PACS: TRACKING 501(C) NON-PROFIT GROUPS ACTIVE IN ELECTIONS 2 (2004) (concluding that non-charitable tax-exempt organizations other than 527s spend at least tens of millions of dollars on political activity each federal election year).

²⁶⁸ And even the current movement may be more than a trickle. See CONG. WATCH, *supra* note 267, at 2 (documenting the tens of millions spent by non-charitable tax-exempt organizations on political activity in each federal election year); WEISSMAN & RYAN, *supra* note 105, at 1 (concluding that some organizations and donors have already shifted their funding emphasis from 527s to alternative groups). The lower level of confirmed and estimated 527 funding in 2006 may also indicate that funds have moved elsewhere, although the fact that these figures are preliminary and 2006 is a non-presidential federal election

these other tax-exempt organizations could well become a torrent – if for no other reason than that the donors who want to contribute large amounts of funds to support political activity will have nowhere else to go.²⁶⁹ The vague definition of political activity for tax purposes also reduces the cost of such a shift. While some activities may be unquestionably political activity,²⁷⁰ organizations could easily re-characterize many others as completely nonpartisan. For example, it may be possible for organizations to re-characterize many current 527 activities, such as voter registration drives that are nonpartisan on their face but are political because they are geographically targeted to areas with close races, as arguably nonpartisan by carefully selecting criteria other than the competitiveness of a particular race as the basis for geographic targeting. Given both the vagueness of the tax law's definition of political activity and the very limited level of IRS enforcement, government scrutiny of such positions is both unlikely and, if it occurs, unlikely to result in reclassification of such activities.

There is also no tax rule that prevents a taxable organization from engaging in political activity.²⁷¹ There is greater uncertainty and therefore greater

year make it difficult to be sure that this is the case. See Press Release, Campaign Fin. Inst., CFI Analysis of 18 Month Section 527 Fundraising Reports to IRS: 527 Political Organizations Raising Money at 2002 Pace, Down from 2004 (Aug. 10, 2006), available at <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=94>.

²⁶⁹ See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (describing the hydraulic nature of political money, in that it has to go somewhere and it is part of a broader ecosystem). One response to this concern is that perhaps the redirection will be in a favored direction, but given the essentially equal independence of both 527s (other than political committees) and other types of tax-exempt organizations, it seems doubtful that the shift here would be particularly favored. See Daniel R. Ortiz, Commentary, *Water, Water Everywhere*, 77 TEX. L. REV. 1739, 1743-44 (1999) (discussing the hydraulic nature of campaign funding in the context of a shift of funds from candidate-controlled groups to independent groups, but refusing to take a position on whether it is better or worse, normatively, for campaign funds to flow to the former as opposed to the latter).

²⁷⁰ See, e.g., *supra* note 43 (providing a transcript of an ad opposing the state congressional campaign of Bill Yellowtail).

²⁷¹ For example, Triad Management Services and Triad Management Services, Inc. were both taxable entities that the courts ultimately determined should have been registered as political committees. They also violated a host of other election laws. Final Judgment and Order Granting Declaratory and Injunctive Relief, *FEC v. Malenick*, No. 02-CV-01237 (D.D.C. July 26, 2005). Despite the fact that the FEC's legal battles with these entities and their founder, Carolyn Malenick, lasted nine years, there is no indication that the IRS asserted at any point that these entities should have been classified as 527s. See, e.g., John Bresnahan, *After Long Fight, Triad Files FEC Report*, ROLL CALL, Nov. 1, 2005 (detailing the outcome of that battle without any mention of IRS involvement). At least taxable entities were also involved in the 2006 election. WEISSMAN & RYAN, *supra* note 105, at 12-13. Whether the IRS will be more likely to make such assertions given the new 527 disclosure rules is unclear.

potential cost for such an organization than even non-527 tax-exempt organizations, as a taxable organization would be exposed not only to the gift tax issue but also to the possibility that contributions qualify as taxable income. But there may be one significant advantage to using a taxable entity: it is not clear that an otherwise taxable organization that engages in political activity as its primary activity would be or could be forced to comply with § 527.²⁷² In rejecting a challenge to the new disclosure rules, the Court of Appeals for the Eleventh Circuit stated that an organization could avoid the disclosure rules simply by choosing not to claim tax-exempt status under § 527.²⁷³ This leads to a perverse and ironic result: the use of tax categories to eliminate “stealth” 527s could lead to the creation of a new category of “stealth” taxable entities. Both the established secrecy of information provided to the IRS by such organizations²⁷⁴ and the lack of a tax-exempt hook to overcome constitutional concerns²⁷⁵ complicates the regulation of such entities through the tax law.

4. Conclusion

The difference in enforcement results and the potential for regulatory arbitrage suggest two conclusions. First, it appears that the FEC is better suited to administer a disclosure regime, and the use of a tax category – § 527 – to trigger the application of that regime generates limited regulatory arbitrage opportunities because the cost of disclosure is relatively small compared to the cost of shifting political activities into another type of entity. Second, both the FEC and IRS are not very effective at enforcement of non-disclosure provisions (restrictions on contributions for the FEC, placement in the correct tax category based on political activity for the IRS) but for different reasons. The FEC is subject to an administrative structure that inhibits such enforcement, while the IRS lacks sufficient resources to engage in such enforcement, particularly given the tax law’s vague definition of political activity. This suggests that a restriction regime that requires both effective FEC enforcement and effective IRS enforcement must overcome two significant hurdles to succeed. And even if the IRS suddenly and

²⁷² Such an entity might be required to register as a PAC, thereby losing any advantage its taxable status might gain, but it is far from clear how effective the FEC would be in enforcing such a requirement. See Bresnahan, *supra* note 271 (summarizing the nine year legal battle that it took to force Triad Management Services to register and file disclosure reports as a political committee, but observing that the reports failed to disclose the identities of donors and that the only penalty ultimately imposed was a \$50,000 civil fine). The FEC recently sued the Club for Growth for failure to register as a political committee, but that suit is still pending. See Complaint for Declaratory, Injunctive, and Other Appropriate Relief, *FEC v. Club for Growth, Inc.*, No. 05-CV-01851 (D.D.C. Sept. 19, 2005), available at http://www.fec.gov/law/litigation/club_for_growth_complaint.pdf.

²⁷³ *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1361-62 (11th Cir. 2003).

²⁷⁴ See *supra* note 206 and accompanying text.

²⁷⁵ See *supra* note 155 and accompanying text.

unrealistically received a flood of additional enforcement resources from Congress, successful enforcement of a mixed election law and tax law regulatory structure is also complicated by the arbitrage opportunity presented by the fact that tax law permits numerous types of entities, not just 527s, to conduct political activities, creating opportunities to shift activities to a lesser-regulated entity, although there are costs to doing so.

IV. SPECIFIC PROPOSALS

These observations and conclusions suggest certain specific proposals both with respect to current law and recent proposals to change current law. These proposals include shifting responsibility for the 527 disclosure rules to the FEC and in general leaving responsibility for enforcing disclosure of political activities, particularly during the midst of the campaign season, to the FEC; not imposing existing political committee contribution restrictions based on the 527 tax classification or any other tax classification; and changing the structure of the FEC to reduce its capture and therefore, hopefully, enhance its effectiveness.

A. *Shift and Keep Responsibility for Disclosure with the FEC*

The FEC's three decades of expertise in obtaining accurate disclosure reports for political committees and promptly making those reports easily accessible to the public, its greater visibility and therefore accountability for regulating political activity generally, and its ability to coordinate the political committee and 527 disclosure regimes argue strongly for shifting responsibility for the 527 disclosure regime to the FEC. The FEC's greater enforcement resources – developed in part specifically to address such disclosures – and relatively effective enforcement of the existing political committee disclosure regime also support this shift. The places where the FEC is weakest – the extent of its capture by incumbent politicians and subsequent ineffective enforcement, particularly with respect to restrictions – are of lesser concern when it comes to disclosure. At the same time, it appears that the relatively low cost of disclosure for most political actors is insufficient to justify the cost of attempting to move out of the 527 category, at least based on the still extensive activities of 527s in 2004, even given the opportunities for such shifts created by both the vague tax law definition for political activity and the relatively ineffective IRS enforcement of tax classifications based on political activity.²⁷⁶ For all of these reasons, any further attempts to require disclosure

²⁷⁶ The differences in the legislative process between election law and tax law tend to support this conclusion, although they are less important here because the disclosure regime is already in place. The shifting of the disclosure responsibility to the FEC would place it within the more visible election law regime. It would also place disclosure responsibility under the oversight of members of Congress, who may be more expert than the members of the tax-writing committees in balancing the free speech and free association concerns raised

of political activity, however defined, should similarly be incorporated into election law and placed squarely within the jurisdiction of the FEC.

One criticism of this proposal is that it does not go far enough to fix the problems with the 527 disclosure rules. Those problems include the unnecessarily low thresholds for disclosure of contribution and expenditure information given that such detailed information is not needed to help enforce restrictions on contributions, as those do not (yet, at least) apply to 527s that are not political committees. They are also arguably unnecessarily low because they apply even to 527s that may engage in federal election related activity only as a small part of their activities or may only engage in activities that are nonpartisan on their face although the intent is to influence the election of one or more candidates.

The first criticism has some merit, and in a perfect world Congress might set the threshold significantly higher, as, for example, is the case for contributions for electioneering communications, which have a \$1000 threshold instead of the \$200 threshold applicable to 527s. The lower thresholds do not appear, however, to impose a significant additional administrative burden.²⁷⁷ The second point ignores the fact that the public has a relatively strong interest in knowing who is supporting or opposing particular candidates, whether federal, state, or local, and to what degree.²⁷⁸

B. *Do Not Impose Contribution Restrictions on 527s*

The recent proposals to impose political committee contribution restrictions on 527s (by redefining "political committee" so that it encompasses most 527s) present more significant problems. Proponents of this change are right to seek it through legislation – as opposed to regulatory change, although they are pursuing that route as well – to ensure that this sharp limitation on contributions is done only after highly visible consideration of the trade-offs involved.²⁷⁹ But they are wrong in assuming that this combination of FEC-enforced instructions imposed on entities subject to an IRS-enforced classification can be effective.

The FEC has the expertise, accountability, and ability to coordinate the existing restrictions on all political committees to implement such restrictions, although here the capture problem and resulting lack of effective enforcement

by such disclosure and coordinating all of the provisions requiring disclosure and restriction of political activity. See *supra* Part III.A.3.

²⁷⁷ See *supra* notes 265-66 and accompanying text.

²⁷⁸ See *supra* note 20.

²⁷⁹ Seeking such a change through regulations as opposed to legislation also raises administrative law concerns. See Polsky & Charles, *supra* note 12, at 1016-27 (arguing that the FEC cannot adopt statutory constructions, and thus regulations, contrary to Congress' intent). See generally Allison R. Hayward & Bradley A. Smith, *Don't Shoot the Messenger: The FEC, 527 Groups, and the Scope of Administrative Authority*, 4 ELECTION L.J. 82 (2005).

are at their highest level, which Congress needs to address (see the next proposal). The problem is that the restrictions would apply based on a tax classification even though the IRS has limited accountability for ensuring that entities engaged in political activity are in fact placed in the right tax category, has no demonstrated ability to coordinate with the FEC on matters relating to political activities, and has enforcement efforts that are hampered by both a vague definition of political activity and limited resources for such enforcement. The fact that exactly the same kind of activity can be conducted in other types of tax entities, specifically other types of non-charitable tax-exempt organizations and taxable entities, aggravates this problem. Although there is a significant but hard to quantify cost of using a different type of entity – at least in part intentionally so, as Congress wanted to encourage tax-exempt organizations to concentrate their political activities in 527s by offering lower compliance and enforcement burdens²⁸⁰ – there are strong reasons to believe that some donors would find the cost worth paying. This is particularly true of those donors who would otherwise find themselves with nowhere else to give their funds to support political activity of their choosing.²⁸¹ One ironic effect of such a shift is that the best-funded groups, which presumably would often be the groups with the largest donors, would be most able to bear the costs of the shift and so would gain an advantage over their lesser funded competitors.²⁸² For similar reasons, seeking to impose limits on contributions or other election-related activities based on any tax classification is unlikely to be effective.

One response to this proposal would be to urge instead that the FEC and the IRS work together to oversee 527s, perhaps with the FEC even lending some of its more abundant enforcement resources to support policing the 527 line (again, assuming Congress could resolve the capture problem and its effects). The problem with such joint administration, however, is that the limited evidence available indicates that joint administration of laws generally does not work,²⁸³ and there are no compelling reasons to believe there would be greater success here. Joint administration might even undermine the strengths that each agency brings to the table. The otherwise politically insulated decisions by the IRS would become subject to politically influenced FEC input; the FEC's accountability would be reduced because it could blame the IRS, with its much larger range of responsibilities and priorities, for any delays in producing guidance or engaging in enforcement.

²⁸⁰ See *supra* note 73 and accompanying text.

²⁸¹ See *supra* note 105 (describing the main sources of funds for 527s).

²⁸² See, e.g., Posting of Brad Smith to Center for Competitive Politics Blog, http://www.campaignfreedom.org/blog/id.37/blog_detail.asp (July 24, 2006) (criticizing a recent Campaign Finance Institute report regarding the use of multiple entities with varying tax classifications to pursue a common political agenda because it focused on the largest such organizations and therefore the ones most able to bear the cost of any additional regulation).

²⁸³ See *supra* note 135 and accompanying text.

C. *Restructure the FEC To Reduce Capture*

Even if Congress makes no further changes in the law with respect to 527s, there is still the problem of the FEC's apparent capture by incumbent politicians and resulting ineffective enforcement, particularly for contribution limits. Here, however, the IRS can provide some help – not as a co-enforcer but as a model. To protect the misuse of the tax laws for political purposes, Congress and the IRS have taken several steps, including limiting the number of political appointees in the IRS to one person (or two, counting the Chief Counsel), granting final decision authority to that single appointee (the Chief Counsel serves in an advisory capacity), and intentionally shielding that one appointee from involvement in particular enforcement actions.²⁸⁴

Existing proposals to change the FEC's structure to combat capture incorporate a number of these elements plus several others, although they arguably do not go far enough, perhaps because of concerns about their political feasibility.²⁸⁵ Common proposals include creating a strong Chair with authority to make some of the decisions now assigned to the full commission,²⁸⁶ reducing the threshold vote required for at least the initial determination that the FEC should begin an investigation from four to three votes,²⁸⁷ and changing to an odd number of commissioners to prevent deadlocks (although it is unclear how the President could maintain a partisan balance with such a change).²⁸⁸ It is true that some commentators have argued any such changes will at best produce marginal changes and at worst actually create less effective enforcement, and so a better solution is to remove the

²⁸⁴ See *supra* notes 192-93, 212-13. When it comes to guidance, the Assistant Secretary for Tax Policy, a political appointee, is also involved, although much of the work is done by professionals in the Assistant Secretary's office.

²⁸⁵ See Federal Election Administration Act of 2006, H.R. 5676, 109th Cong. (2006); BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 10, 128-39 (2002) (calling the FEC "an icon of ineffectiveness" and suggesting that the FEC be run by a five-member board of retired judges).

²⁸⁶ See H.R. 5676 § 101(a) (amending FECA § 361 to grant the Chair of the new Federal Election Administration new powers); JACKSON, *supra* note 174, at 63-64 (arguing for a new structure for the FEC); McCain, *supra* note 244, at 115, 119-20 (2004) (discussing proposed legislation to replace the FEC); see also PROJECT FEC, NO BARK, NO BITE, NO POINT: THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION'S CAMPAIGN FINANCE LAWS 2 (2002) (proposing the creation of a new election law agency with a single administrator); Verkuil, *supra* note 135, at 275-78 (arguing that independent agencies would, in general, improve their effectiveness by having a single administrator, albeit one who, in deference to congressional concerns, could be removed for cause by Congress).

²⁸⁷ See Thomas & Bowman, *supra* note 226, at 592-93.

²⁸⁸ H.R. 5676 § 101(a) (amending FECA § 352 to create a new Federal Election Administration with three members); JACKSON, *supra* note 174, at 64-65; McCain, *supra* note 244, at 119; Potter & Shor, *supra* note 220, at 334.

restrictions in their entirety while emphasizing disclosure.²⁸⁹ But this argument also supports adopting a more radical restructuring of the FEC. Again, the IRS may provide a useful model here, indicating that the establishment of a single commissioner appointed by the President, who while overall in charge of (and therefore accountable for) the FEC's activities would be shielded from involvement in specific enforcement actions, might be enough to substantially reduce the capture problem.

CONCLUSION

Election law and tax law are different; the FEC and the IRS are different. These facts are obvious but Congress has ignored them in its rush to impose what have historically been election law rules on tax-classified 527s. This Article has attempted to explore those differences and through doing so to provide a reasoned basis for choosing which body of law and which agency is best suited for considering and pursuing regulation of political activity. The result of this approach has led to some proposals regarding the direction that future change in this area should take.

This approach has also required the development of a new framework for making this choice when considering a regulatory, as opposed to economic, policy goal. This framework involves considerations of the legislative process, the administering agency, and the overall effectiveness of each body of law at issue to determine whether a particular regulatory program is best served by inclusion in one body of law or another, or through some type of joint administration. In the particular context of regulating political activity, this framework led to the conclusion that the historically different roles of election law and tax law, and of the FEC and the IRS, strongly suggest that any new attempts to regulate political activity are best housed in election law. The only caveat is the need to resolve the FEC's vulnerability to capture by many of the candidates it is supposed to regulate, but numerous proposals already exist and even have been introduced in Congress to limit or eliminate this weakness.

The insights of this framework not only have ramifications for the important but relatively narrow question of how to choose the best substantive body of law to regulate political activity, however. They also have ramifications for any attempt to use the tax law, as opposed to another substantive body of law, to regulate a set of activities. One area in which this framework may have immediate application is the increasing use of the tax law to not only determine the tax status of nonprofit organizations and contributions to them, but to require such organizations to disclose their finances and activities and to place pressure on such organizations to adopt certain good governance processes and procedures.²⁹⁰ Another possible application is the proposed use of the tax law to increase the financial transparency of public corporations by requiring them

²⁸⁹ See *Lochner & Cain*, *supra* note 220, at 1935-36.

²⁹⁰ See, e.g., PANEL ON THE NONPROFIT SECTOR, *supra* note 10, at 23-82 (making various proposals along these lines); STAFF OF S. COMM. ON FIN., *supra* note 10.

to disclose their federal tax returns.²⁹¹ Other applications may also exist, including making choices that do not involve tax law. Such applications are beyond the scope of this Article, but hopefully this Article has advanced the ability to analyze and make such choices.

²⁹¹ See, e.g., *A Tune-Up on Corporate Tax Issues*, *supra* note 11, at 2 (statement of Sen. Grassley, Chairman, S. Comm. on Fin.).